80-716

No. _____

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

LONE STAR STEEL COMPANY
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

and

UNITED MINE WORKERS OF AMERICA
Intervenor

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a union bargaining proposal which prohibits an employer from alienating all or part of his business (including physical assets) covered under the collective bargaining contract unless the acquiring employer agrees to assume the predecessor's collective bargaining contract, *in toto,* a mandatory subject of bargaining within the meaning of 29 U.S.C. §158(d).

2. Whether the "Hot Cargo" clause 29 U.S.C. 158(e) of the National Labor Relations Act forbids collective bargaining agreements which restrain the alienation of all or part of an employer's business (including physical assets) covered under the collective bargaining contract unless the acquiring employer agrees to assume the predecessor's collective bargaining contract, *in toto.*

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UNITED MINE WORKERS OF AMERICA
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Lone Star Steel Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals including dissent is reported at _____F.2d _____ (1980) (App. A, p. A-1). The order denying Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc including dissent is

reported at _____F.2d _____ (1980) (App. B, p. B-1). The decision of a divided National Labor Relations Board modifying a ruling by an Administrative Law Judge is reported at 231 NLRB No. 88 (1977), (respectively Apps. C and D, pp. C-1 & D-1).

JURISDICTION

The judgment of the Court of Appeals was entered July 28, 1980 (App. A, p. A-28). Petitioner's timely Petition for Rehearing was denied September 5, 1980. The jurisdiction of this Court is involved under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Is a union bargaining proposal which prohibits an employer from alienating all or part of his business (including physical assets) covered under the collective bargaining contract unless the acquiring employer agrees to assume the predecessor's collective bargaining contract, *in toto,* a mandatory subject of bargaining within the meaning of 29 U.S.C. §158(d).

2. Whether the "Hot Cargo" clause 29 U.S.C. 158(e) of the National Labor Relations Act forbids collective bargaining agreements which restrain the alienation of all or part of an employer's business (including physical assets) covered under the collective bargaining contract unless the acquiring employer agrees to assume the predecessor's collective bargaining contract, *in toto.*

STATUTES INVOLVED

The relevant portions of the Labor Management Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, *et seq.*) are set forth below:

Section 8(b)

It shall be an unfair labor practice for a labor organization or its agents—

(3)

to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a);

(4) (i) (ii) (A)

(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 8(e);

* * *

Section 8(d)

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . .

* * *

Section 8(e)

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such

employer ceases or refrains or agrees to cease and refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void:

STATEMENT OF THE CASE

A. The Facts

Petitioner is a Texas-based steel producer. It uses 36,000 to 40,000 tons of coal a month to make coke for its furnaces. Petitioner acquires its coal in three ways; by purchase; by mining its own leases; and by occasionally letting contracts to mining contractors.

In 1973, Petitioner assumed direct operation of one of its mines (the Starlight Mine) near McCurtain, Oklahoma, from a contractor, the River Corp. River had signed the National Bituminous Coal Operators (BCOA) collective bargaining agreement with the United Mine Workers of America (UMWA). Petitioner assumed that agreement in part as an independent signatory.[1]

Petitioner and other independent signatories were notified that the contract would expire November 12, 1974. A nationwide strike began Midnight November 12, 1974, which the employees at McCurtain joined. The UMWA and BCOA executed a new national agreement December 5, 1974. That national agreement with minor modifications became the object of the UMWA's strike against Petitioner (App. E, p. E-1). The strike at McCurtain has continued except for a 60-day "truce"

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[1] Lone Star was not a member of BCOA's multiemployer bargaining group.

period from approximately January through March 1975.

The contractual provisions giving rise to the instant case follow:

> The enabling language (called the "successor clause") found at Article I of the Agreement (App. E, p. E-1).
>
> > In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement.
>
> The application of contract clause (called the "coal lands" clause) found in Article II, Section (f) (App. E, p. E-5).
>
> > As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use.

The Petitioner viewed these clauses with alarm. In conjunction with the remainder of Articles I and II, which define the scope and coverage of the contract, the clauses bind assets and operations outside the immediate bargaining unit to the terms of the contract, and allow the union to prohibit sales, leases, and a variety of business relationships unless the neutral purchase or lessee agreed to assume the entire UMWA agreement. Petitioner wanted the right to sell or enter long term mining contracts

elsewhere if needed and sought to have the contract apply *only* to the McCurtain mine.

In March of 1975, Petitioner filed Unfair Labor Practice Charges against the UMWA alleging, among other things, that the successorship clause was a "Hot Cargo" provision prohibited by 8(e) of the Act; therefore, the strike to obtain it violated 8(b) (4) (A) of the Act. Petitioner also charged that the "successorship language" and "coal lands" clause were non-mandatory subjects of bargaining; therefore, the UMWA's strike to obtain the clauses violated 8(b) (3) of the Act. Complaint issued and a hearing was held before an Administrative Law Judge. His decision was appealed to the NLRB, which rendered its decision. Thereafter, the parties appealed to the Tenth Circuit.[2]

B. The NLRB Rulings

The Board ruled that the successor language was not prohibited by 8(e). Over member Walther's dissent, it also ruled that the successor language and the coal lands clause were mandatory subjects of collective bargaining.

1. The basis of the NLRB ruling that the successorship clause did not violate 8(e).

The Board concluded that the successor language did not violate 8(e) based on a rationale expressed in two of its prior cases, *Int. Union of Operating Engineers, Local 701, AFL-CIO (Cascade Employers Assoc. Inc.),* 221 NLRB 751 (1975); and *Dist. No. 71 Int. Assoc. of Machinists and Aerospace Workers, AFL-CIO (Harris Truck and Trailer Sales),* 224 NLRB 100

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[2]The Tenth Circuit partially reversed the NLRB. It found that the coal lands clause was a permissive subject of bargaining. It upheld the NLRB determination that the successorship clause did not violate 8(e), and was a mandatory subject of bargaining.(See App. A, p. A-28)

(1976). The Board reasoned that Congress never intended 8(e) to prevent agreements prohibiting asset sales unless a purchaser or successor was willing to become a union signitor. It ruled that the successorship clause violated the letter of the statute but not its spirit, because the alienation of assets is not "doing business" within the congressional intent for 8(e). It concluded that no neutral "customers" were improperly enmeshed in a labor dispute between a primary employer and its union by the clause.[3]

The Board further rejected the argument that enough regular trading and sale of mining assets occurred in the industry to nevertheless justify a violation under the exception carved out by the Board and the Second Circuit in *National Maritime Union of America, AFL-CIO (Commerce Tankers Corp.) v. NLRB,* 196 NLRB 1100, enf'd 486 F.2d 907 (2d Cir.), cert. den. 416 U.S. 970 (1974). There, a union tried to enforce a clause similar to the one at issue, but the NLRB and the Court struck it down as an 8(e) clause. The rationale in that case was that the evidence justified a one time conclusion that asset trading was common to the maritime industry; therefore, the clause prohibited "doing business" and violated 8(e).

2. The NLRB rulings that the successorship clause was a mandatory subject of collective bargaining.

The Board, over member Walther's dissent, concluded that the successorship clause seemingly falls outside the letter of 29 U.S.C. §158(d) but, nevertheless, ruled that the clause was a

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[3]The Board decision did not address the question of whether the successor language contemplated certain kinds of contracting and leasing in addition to the sale of assets because of the interrelationship between Articles I and II. Presumably, it believed its finding that the clause was not within the intent of 8(e) rendered decision on that issue unnecessary. The Circuit Court later dealt with the issue.

mandatory subject of bargaining. It applied the *vitally affects* exception set forth in *Allied Chemical & Alkali Workers of America Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

It held that the "touchstone" in cases such as this, where the clause appears to fall outside 8(d), is not the effect on neutral third parties (such as lessors and purchasers) or the effect on the employer's freedom to conduct his business, but whether the clause *vitally affects* the job security of the workers in the bargaining unit. The NLRB did not find it fatal that the clause required assumption of the entire collective bargaining contract, including the several non-mandatory and illegal provisions contained in this particular agreement.[4]

Walther's dissent complained that the majority did not consider the significance of the breadth of this clause. He observed that a direct frontal attack on the vital issue of job security was mandated by the test of *Allied Chemical, id.*, and this clause fails that test. Walther wrote that the majority erred in concluding that the clause *vitally affects* job security, because the clause nowhere requires any new employer to take along the employees. He argued that if the clause only saves the contract, not job security, it must fail.

Walther also disagreed strongly with the Board's framing of the test of 8(d) to eliminate consideration of third party concerns, and the employer's freedom to conduct its business. He

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[4]Such as the "coal lands" clause, Article II, Section (A), (App. E, p. E-5), which the Tenth Circuit found was a permissive subject in the instant case (App. A, p. A-28). The agreement also contains a number of clauses which the NLRB and the Third Circuit have held were 8(e) clauses. Most of these clauses are part and parcel of Articles I and II of the Agreement. See *Amax Coal Co. v. NLRB*, 614 F.2d 872, 886 (3rd Circuit), reh. den. August 29, 1980, pet. for cert. pend. #80-289.

felt this represented a departure from the traditional test of 8(d). He also believed that the decisions *NLRB v. Burns Int. Security Services, Inc.*, 406 U.S. 272 (1972), and *Howard Johnson Co., Inc. v. Detroit Local Jt. Executive Board, Hotel and Restaurant Employees and Bartenders Int. Union,* 417 U.S. 249 (1974), should be read to require consideration of the employer's freedom to conduct its business as a weighty and legitimate factor in applying the "vitally affects" exception.

C. The Circuit Court Opinion

1. The "Hot Cargo" Issue

Petitioner argued that 8(e) creates two separate tests, a "products test" and a "cease doing business" test, and that the NLRB improperly ignored both to the derogation of the rule set forth in *National Woodwork Mfg. Assoc. v. NLRB,* 386 U.S. 612 (1967). There, this Court ruled that the "touchstone" for secondary activity is whether the agreement or its maintenance is addressed to the labor relations of the contracting (primary) employer *vis a vis* his own employees (*id.* at 645).

The Tenth Circuit recognized that 8(e) provides two distinct tests, but rejected that notion that the successorship clause was broad enough to be used as a back door means of imposing improper "product" restrictions through arbitration. It ruled that even from the viewpoint of a secondary employer, a primary employer's "assets" would not be "products." It further rejected Petitioner's argument that under *National Woodwork, id,* the test is not whether the subject matter of a transaction constitutes a "product" or a certain *kind* of "doing business", but whether *an object* of the activity was secondary in nature, no matter what the subject matter.

The Tenth Circuit ruled Congress did not mean to prohibit restrictions upon the sale of capital assets since assets are not

"products" nor are transactions for their trade "doing business" within the congressional intent. The Tenth Circuit thus held that 8(e) will not apply unless the *subject matter* of the prohibition of a potential business transaction deals either with a primary employer's so-called "end product," or agreements to disrupt a "continuing business" relationship (not involving assets) no matter the secondary result or goal.

The Tenth Circuit affirmed the Board's conclusion that the successorship language was outside the exception carved out in the case *National Maritime Union of America, AFL-CIO (Commerce Tankers Corp.) v. NLRB,* 196 NLRB 1100, enf'd 486 F.2d 907 (2d Cir.), cert. den. 416 U.S. 970 (1974). The UMWA's chief negotiator testified that asset sales had been a problem in the industry and this clause was meant to prevent miners from "starting over." The Circuit Court disagreed with Petitioner's argument that this constituted a weighty admission about industry practice and was itself sufficient evidence to meet the limited *Commerce Tankers* exception.

The Tenth Circuit also rejected the argument that the successor clause was broad enough to prohibit contracting out and subleasing. Petitioner argued the clause can be read to prohibit certain long term contracting and leasing situations because of the limited nature of the more specific clauses dealing with certain kinds of subcontracting and leasing, and the clear interrelationship between the language of Articles I and II of the Agreement. Applying the rule of *ejusdem generis,* the Circuit Court ruled that the successor clause contemplated only *permanent* alienation. The Court recognized that the rule of *ejusdem generis* has limited application but nevertheless applied it to save the successorship language. It ruled that because the UMWA agreement elsewhere contained specific clauses not requiring a

lessee or subcontractor to assume the entire contract[5], and since this specific language would otherwise be considered mere surplusage if the general clause were read to apply to contracting out, then the successor clause should be construed only to apply to permanent alienations such as asset sales.

2. Rulings by the Circuit Court on the issue of whether the successorship language is a mandatory or permissive subject of bargaining.

The Circuit Court found that the "vitally affects" test was properly applied. It ruled that the Board properly used its "special expertise" in classifying bargaining subjects, and properly excluded third party concerns like the rights of potential purchasers, and an employer's managerial freedom from consideration as part of the test. The Court rejected the argument that the decisions in *NLRB v. Burns Int. Security Services, Inc.*, 406 U.S. 272 (1972), and *Howard Johnson Company, Inc. v. Detroit Local Jt. Executive Board, Hotel and Restaurant Employees and Bartenders Int. Union,* 417 U.S. 249 (1974), require third party concerns to be considered as a factor in classifying subjects of bargaining. The Court viewed those cases as being concerned primarily with the protection of the fundamental freedom to negotiate, not whether the clause is mandatory or permissive. Thus, it held that the interests of purchasers and the managerial rights of employers are not proper factors in the test of whether or not the employees in the unit are *vitally affected.*

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[5]This was incorrect. The "specific" clauses in Article II have been found to require assumption of the UMWA with the lease and are thus 8(e) clauses requiring cessation of business relationships with neutral employers See App. E, Articles I and II, p. E-1 and *Amax Coal Co. v. NLRB,* 614 F.2d 872, 886 (3rd Circuit), reh. den. August 29, 1980, pet. for cert. pend #80-289. It should be observed that leasing and contracting are covered in several places – the enabling clause, Article I; the work jurisdiction clause, Article II (a), Article II (f), Article II (g), Article II (h), and Article II (i).

As J. Barrett's dissent observed, the Court did not directly address the questions of the broad scope of the clause, in the context of mandatory vs. permissive. He noted that the Third Circuit in *Amax Coal Co. v. NLRB,* 614 F.2d 872, 886 (3rd Circuit), reh. den. August 29, 1980, pet. for cert. pend. #80-289, had recently ruled that the successor language was permissive because of its broad scope. The Tenth Circuit apparently agreed with the NLRB that the preservation of the entire agreement was itself an issue of vital concern to employees.

The Circuit Court also rejected the argument that the NLRB's decision in *General Motors Corp.,* 191 NLRB 951 (1971), enf'd 470 F.2d 422 (D.C. Cir. 1972), and this Court's decision in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 220 (1964), require a ruling that this successor language was non-mandatory on the theory that an employer's decision to sell all or part of his business is a purely management prerogative outside of 8(d). The Court found that this clause was designed to prevent certain "effects" of the sale, not the sale itself, and rejected the argument that the clause was tantamount to an improper proposal of limited ownership.

REASONS FOR GRANTING THE WRIT

A. This type of successorship clause is a permissive subject under 8(d).

1. There is now a split of authority among the Circuit Courts on a vital issue of Management Labor Relations: whether the "vitally affects" exception to 8(d) allows a union to bargain to impasse, and strike to achieve a contract clause allowing it to prevent a sale or alienation of assets unless a successor agrees to assume the entire labor agreement. Further, the Tenth Court of Appeals has ruled contrary to its own

precedent on the issue of bargaining for clauses in a labor agreement which expand the scope of a unit and the Court should remedy this error.

The "touchstone" of 8(d) is whether or not a proposed subject of bargaining settles only aspects of the working relationship between an employer, and his employees in that bargaining unit. *Allied Chemical & Alkali Workers of America Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). There is one exception. Where clauses are seemingly outside this test, they may, nevertheless, be found mandatory if it is shown that the subject matter both *vitally affects* important employee interests, and the clause at issue is specifically drafted to be a *direct frontal attack* on the problem. *Teamsters Union v. Oliver,* 358 U.S. 283 (1959).

In the case of *Amax Coal Co. v. NLRB,* 614 F.2d 872, 876 (3rd Circuit), reh. den. August 29, 1980, pet. for cert. pend. #80-289, the Third Circuit ruled that UMWA successor language at issue failed the test and was permissive. It found, (a) the clause requires bargaining on a unit basis broader than that certified,[6] and (b) the clause goes too far by requiring that the entire contract be preserved when narrower more direct clauses could have been drawn.

Both arguments were raised before the NLRB and the Tenth Circuit, but rejected.[7] The Tenth Circuit ruled that the

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[6]Citing *Doud's v. Int. Longshoremen's Assoc.*, 241 F.2d 278 (2d Cir. 1957).

[7]It is curious that the Tenth Circuit did not find that this successor language improperly broadened the scope of the unit, thus, rendering it permissive. That Circuit recently ruled in the case of *Newspaper Printing Corp. v. NLRB,* 625 F.2d 956, pet. for reh. den. September 8, 1980, that an employer who bargained to impasse for a clause giving it the right to alter the unit scope during the term of the contract was *per se* in bad faith under the rationale of *Doud's, supra.* (Note 6), because parties may not bargain to impasse over a change in the scope of a unit.

NLRB had properly applied its "special expertise" in classifying bargaining subjects. Thus, under the *vitally affects* exception the issue of preserving an entire contract was rendered mandatory.

Petitioner submits that this split of authority must be reconciled in favor of the ruling in *Amax Coal Co., id.*

The question of asset alienation as a bargaining subject is critical to the continued stability of labor relations nationwide. So too, the issue of bargaining for clauses requiring a unit larger or different from the one at issue must remain a permissive subject of bargaining. If the decisions below stand, the *vitally affects* exception would allow a union, under the guise of preserving the entire contract, to bargain for an expanded unit, and to preserve what would otherwise be permissive subjects of bargaining if viewed individually. Thus, if this decision stands, the *vitally affects* exception would effectively swallow two, heretofore, well established principles of Federal Law.

In his concurring opinion in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 220 (1964), Justice Stewart observed that the words of 8(d) are words of limitation.[8] Stewart correctly wrote that in today's complex society nearly every subject has some impact, direct or indirect, on the bargaining unit's wages and working conditions (*id.* 220-221). Nevertheless, this impact should not legitimize any subject that comes to mind. In contrast to this logic, the decisions below, under the umbrella of preserving the entire contract, would allow a union to carry through anything in the four corners of a contract to a successor, no matter if some of the particular

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[8] In accord are the decisions *Allied Chemical & Alkali Workers of America Local Union No. ! v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *NLRB v. Wooster Div. of Borg-Warner,* 356 U.S. 342 (1958).

clauses therein were permissive or illegal as in this case.

The decisions below treat the preservation of the entire contract as though it were one issue and seem to ignore the question of the preservation of the many separate underlying clauses. It is submitted that preservation of an entire agreement is clearly beyond the scope of 8(d). Especially where, as here, that agreement expands the scope of the original unit, and requires preservation of a number of permissive and illegal subjects of bargaining.

2. This Court should further address and settle the critical issue of whether so-called "third party" concerns, such as the employer's right to conduct its business, and a purchaser's to buy assets free of encumbrance, should be a critical part in the test of whether a bargaining clause is a mandatory or permissive subject of bargaining under 8(d).

This case brings together, for decision, two seemingly unrelated doctrines, the extent of the obligation to bargain by a purchaser, and the obligation of a predecessor to bargain over the sale of his assets.

In the cases *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 549 (1964); *NLRB v. Burns Int. Security Services, Inc.* 406 U.S. 272 (1972); and *Howard Johnson Co., Inc. v. Detroit Local Jt. Executive Board, Hotel and Restaurant Employees and Bartenders Int. Union,* 417 U.S. 249 (1974), this Court developed the doctrine that absent specific agreement, or facts justifying a conclusion that the purchaser impliedly accepted a predecessor's collective bargaining contract, a successor should not be burdened with the labor contract of a predecessor, but should be free to seek his own agreement. If, however, a majority of the predecessor's employees were hired, and it becomes

clear that there will not be any significant changes in the operation, then both the bargaining obligation and the contract might attach to the successor.

Along this line, but in the context of 8(d), this Court in *Allied Chemical & Alkali Workers of America Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), suggested that in determining whether a clause was mandatory or not, the employer's freedom to conduct its business affairs may be as equally important as the possible effect upon the employees of the subject at issue. Both the NLRB and the Courts have long held that the decision[9] to sell a business is not a mandatory subject of bargaining, but the effects of that sale on employees would be.

Justice Marshall raised the viability of an approach to the problem of successorship which directly joins these two isues in Footnote 3 of the decision in *Howard Johnson Co., Inc. v. Detroit Local Jt. Executive Board, Hotel and Restaurant Employees and Bartenders Int. Union*, 417 U.S. 249 (1974), when he said:

> The Union apparently did not explore another remedy which might have been available to it prior to the sale, *i.e.*, moving to enjoin the sale of Howard Johnson on the ground that this was a breach by the Grissoms of the successorship clauses in the collective bargaining agreements. See *National Maritime Union v. Commerce Tankers Corp.*, 325 F. Supp. 360 (SDNY 1971), vacated 457 F.2d 1127 (CA2 1972). The mere existence of the successorship clauses in the bargaining agreements between the Union and the Grissoms,

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[9]The rule is that the decision to sell a business is not mandatory. The obligation to bargain over the *effects* of that decision are. See *General Motors Corp.*, 470 F.2d 422, 425 (CA D.C. 1972). The Tenth Circuit ruled that this clause was no more than advance *effects* bargaining (App. A, p. A-22).

> however, cannot bind Howard Johnson either to the substantive terms of the agreements or to the arbitration clauses thereof, absent the continuity required by *Wiley*, when it is perfectly clear the Company refused to assume any obligations under the agreements. (*id.* at p. 258)

The Circuit Court in the *Commerce Tankers, id.*, case referred to by Justice Marshall, rejected a union injunction to prevent the sale to non-union purchasers [10] on the ground that the successorship clause violated 8(e). Thus, in the context of both the successorship doctrine, and the scope of the bargaining obligation under 8(d), this Court and the Circuits have expressed strong concern over the extent to which the bargaining obligation may interfere with management's right to retain ultimate control over its assets.

In the *Wiley, Burns,* and *Johnson, supra.*, trilogy this Court balanced the interests of the *new* employer's right to manage business affairs against the interest of the employees, and held that dependent upon the degree of acquiessance to the prior bargain (implied or express) the new employer may be free to change what he deems necessary. So too, in *General Motors Corp.*, 191 NLRB 951 (1971), enf'd 470 F.2d 422 (D.C. Cir. 1972) and *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 220 (1964), the rule has developed that unions may only force bargaining about the effects of a decision to sell, not the decision itself. Thus, it is submitted that a union's right to force bargaining over whether a sale or lease must take the union

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[10] Here, Article 27 of the Agreement allows the UMWA the right to enjoin *any* breach of the successor clause. The last paragraph of that article reads (App. E, p. E-7):

> The Employer, however, expressly authorizes the Union to seek judicial relief, without exhausting the grievance machinery, in cases involving successorship.

agreement along as a condition must be rejected as a threat to both doctrines.

Petitioner submits that a clause such as this is tantamount to a degree of forced ownership and improperly jeopardizes the managerial function of both predecessor and potential purchaser. This Court should not allow unions to circumvent these separate and well developed doctrines under the colour of the *vitally affects* test. There is clearly a limit to the purpose which may be achieved in bargaining agreements, and that limit is crossed where the contract becomes a forced covenant running with the assets.

Work preservation is a valid purpose. So too, agreements about the effects of a decision to sell are valid, but this clause goes too far. It binds the bargaining contract to assets, follows their movement, and effectively makes the union a forced partner to any decision to sell.

B. This type of successorship clause is an agreement not to do business in violation of 8(e).

1. The rulings below jeopardize 8(e) by the promulgation of a "subject matter" test that directly contravenes the rule in *National Woodwork Mfg. Assoc. v. NLRB*, 386 U.S. at 612 (1967). The decisions below would allow unions to picket and strike neutral employers in an effort to halt mergers, asset sales, or partial acquisitions of a business.

The subject matter of an agreement should not decide whether it is a secondary or primary clause within the meaning of 8(e).

In *National Woodwork, id.*, this Court ruled that there need be no actual dispute with the neutral employer, but

> " . . . so long as the tactical object of the agreement and its maintenance is directed to employers or employees other than the employees of the primary employer thus making the agreement secondary in nature." (*id.* 645).

The rulings below limit and change this well formed test by requiring a hitherto unrequired condition precedent to its application. Specifically, the decisions below require a finding that either the "end products" of a primary employer be involved, or else a certain kind of "doing business" be found before an employer may seek protection under 8(e).

Petitioner submits that the purpose of Congress in passing the second test of 8(e) was to avoid the then continuing efforts by unions to circumvent the old "products" test by arguing over what was and what was not "product" or "hot goods".[11] Thus, to assert, as the NLRB and Tenth Circuit have done, that 8(e) only applies to *certain kinds* of "doing business" and so-called "end products" denudes the test[12] and limits its protection.

In *National Woodwork, supra.*, this Court recognized that legitimate work preservation goals become illegitimate secondary objects where *an* object of a clause is to control the employment practices of firms who seek a business relationship with the primary employer, *or* where the general thrust of the clause is to aid union members generally. It should be observed that the test does not say "what kind" of business relationship. Thus, two alternate tests emerge. First, is *an object* of a clause to set employment practices of neutral firms. Second, is *an ob-*

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[11] See Senator McLellan's remarks Vol. II, *Leg. History of LMRDA*, 1959, pp. 1162-63, 1519, 1568, hereafter called "Leg. Hist."

[12] Specifically, the amendment was a response to this Court's 1958 decision in *Local 1976, United Brotherhood of Carpenters and Joiners of America v. NLRB*, 357 U.S. 93 (1958).

ject of a clause the protection of union members *generally* versus those in the unit. Here, the successor clause fails *both* tests.

This Court, in the recent decision *Connell Const. Co., Inc. v. Plumbers and Steamfitters Local 100,* 421 U.S. 616 (June 2, 1975) said,

> Section 8(e) was part of a legislative program designed to plug loopholes in 8(b) (4)'s general prohibition of secondary activities. In 8(e) Congress broadly prescribed using contractual agreements to achieve the economic coercion prohibited by 8(b) (4).

Following this test, if Employer A and his union are in a dispute, and that Employer decides to sell his business to Employer B, the union should not be allowed to picket Employer B to prevent the acquisition in furtherance of his dispute with Employer A. Under the decisions below, however, a union may accomplish this exact result by forcing Employer A to sign a successor clause prohibiting a sale unless Employer B assumes the contract. Indeed, under the subject matter limitations expressed below, this union *could* picket directly at Employer B with impunity because their business relationship is not "doing business" according to the decisions below.[13]

It is submitted that this is precisely the result Congress intended 8(e) to prohibit, but which this case would uphold.

While it is true that a thing may violate the letter of a statute but not its intent,[14] all so-called "asset" ownership transactions are now held open to direct labor pressure under this decision. This Court may take judicial notice that asset sales

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[13]The "products" and "doing business" tests of 8(e) and 8(b) (4) (B) are identical. The terms have never represented separate tests.

[14]*Church of the Holy Trinity v. United States,* 143 U.S. 457, 459 (1892)

between and among corporations often require continuing relationships of years to complete depending on the contingencies involved, and whether a purchaser is able to make profitable and significant operational changes during the transition. Now, the rule will be that a union can bargain for an agreement tailored to future neutral owners which forces them to agree, as a condition of acquisition, to assume the entirety of the *present* bargain. So too, a union can now picket potential purchasers to abrogate pending sales or mergers.This result should not and must not be allowed. This is the present use of a primary employer as the tool to achieve union institutional objectives outside the bargaining unit at issue.

2. The decisions below utilize a rule of contract construction that jeopardizes and conflicts with the statutory rule of construction that if *an* object of a clause is secondary, then the clause must fail under 8(e).

The secondary boycott cases are clear and, in accord, if *an* object of a contract clause results in a secondary effect, the clause is secondary.[15]

The Tenth Circuit applied the rule of *ejusdem generis* to the successorship language, and concluded that the clause was designed only to cover permanent alienations. Thus, it rejected Petitioner's arguments that the language of the contract can also be read to prohibit leasing and contracting out on its face.

Specifically, the enabling clause forbids (a) sale, (b) conveyance, and (c) other transfers or assignment of "covered operations." These are terms clearly and expressly designed to

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[15] *National Woodwork Mfg. Assoc. v. NLRB*, 386 U.S. at 612 (1967); *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (June 2, 1975); *UMWA v. Pennington*, 381 U.S. 657 (1965); *Employing Lithographers of Greater Miami v. NLRB*, 301 F.2d 20 (5th Cir. 1962).

cover sales and any other form of conveyance or assignment. Article II at Sections (a), (f), (g), (h), and (i),[16] further prohibit certain specific types of agreements. Thus, Article II (g) prohibits the employer from contracting out the transportation of coal, repair and maintenance work, and mine reclamation. This clause standing alone, however, *does not prohibit contracting out a coal lease to a mining contractor. The successor clause would.*

Section (h) of Article II refers only to leasing, subleasing, and licensing, not contracting. The Court may take judicial notice that the term "contracting" arguably requires coal production to go only to the party letting the contract, while a lessor or assignee is usually free to produce coal or not as he chooses. There is also a myriad of different reclamation responsibilities in the various agreements. In short, the terms arguably refer to a variety of business relationships and may be read in many different ways. This was Petitioner's concern and its reason for rejecting the clause.

The Tenth Circuit recognized that the rule of *ejusdem generis* was narrow, and a clause should fail if both the general and specific provisions may be given effect. It, nevertheless, applied the rule here, saying that the successor clause covers only "asset" sales. The Court found that because there were *specific* subcontracting agreements not requiring the UMWA agreement

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[16]Many of these, especially the contracting and leasing clauses, were found separately to be "hot cargo" clauses in and of themselves by the NLRB and Third Circuit in the decision *Amax Coal Co. v. NLRB,* 614 F.2d 872, 886 (3rd Circuit), reh. den. August 29, 1980, pet. for cert. pend. #80-289.

to go along[17] and because such clauses would be rendered meaningless if both clauses were given effect, the principle of construction should apply to limit the meaning of the successor clause.

Petitioner submits that the decisions below are flatly wrong, and jeopardize the test of 8(e). First, the successor clause arguably covers a variety of contracting arrangements not covered by the specific clauses. Second, the principle of *ejusdem generis* is a rule of contract construction that, as applied here, runs headlong into the statutory rule flatly prohibiting *any* secondary object of an agreement. Third, assuming *arguendo* that the principle could apply, the *Amax, infra.*, Note 17, decision rendered the "specific" contracting and leasing clause unenforceable 8(e) clauses. Thus, the successor language stands alone, and there could not properly be specific clauses against which the general clauses could be interpreted. For the rule of construction to apply, the specific clauses must be valid, which here they are not. Thus, only the successor clause, which on its face violates 8(e), would remain. Yet, the UMWA did nothing in negotiations to allay Petitioner's fears and that the clause could be used to prohibit contracting and leasing arrangements.

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[17] Again, as observed in Footnote 5, this conclusion is puzzling since in *Amax Coal Co. v. NLRB*, 614 F.2d 872, 886 (3rd Circuit), reh. den. August 29, 1980, pet. for cert. pend. #80-289, the NLRB and the Third Circuit found specifically that those clauses were 8(e) clauses. Further, assuming they are invalid under 8(e) and not properly part of the agreement then *only* the successorship clause remains, and since this clause on its face can apply to leases, it must fail because it then stands alone.

CONCLUSION

For the foregoing reason, the Petitioner should be granted, and the decisions below reversed.

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APPENDICES

APPENDIX A

PUBLISH

No. 77-1667

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
JUL 28, 1980
HOWARD K. PHILLIPS
Clerk

LONE STAR STEEL COMPANY
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

and

UNITED MINE WORKERS OF AMERICA
Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Lynn P. Mattson, Attorney (Kothe, Nichols & Wolfe, Inc., Tulsa, Oklahoma, was on the brief) for Petitioner

David A. Fleischer, Attorney, National Labor Relations Board (Jay E. Shanklin, Attorney; John S. Irving, General Counsel; John E. Higgins, Jr., Deputy General Counsel; Carl L. Taylor, Associate General Counsel; Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, Washington, D.C., were on the brief) for Respondent

Maynard I. Ungerman, Attorney, Tulsa, Oklahoma (John B. Wimbish, Attorney, Tulsa, Oklahoma was on the brief) for Intervenor

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Before Holloway and Barrett, Circuit Judges, and MILLER, Judge*

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*Honorable Jack Richard Miller, United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation

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HOLLOWAY, Circuit Judge

Petitioner Lone Star Steel Company (Lone Star) seeks to set aside or modify a decision and order of the National Labor Relations Board (the Board), 231 NLRB No. 88, which modified an earlier ruling by an ALJ and dismissed petitioner's complaint against the United Mine Workers of America (the Union), charging a series of unfair labor practices under §§8(b) (3) and (b) (4) (A) of the National Labor Relations Act, 29 U.S.C. §§158(b) (3) and (b) (4) (A) (1976). The Union has intervened against Lone Star's petition. General Counsel for the Board asks that the petition for review be denied.

THE FACTUAL BACKGROUND

a. The controversy over the clauses.

Lone Star is a Texas based manufacturer of steel products, principally pipe for use in the oil and gas industry. In connection with its business, Lone Star consumes 36,000 to 40,000 tons of coal per month to produce coke, an essential element in the steel making process. Coal is obtained both from outside suppliers and from coal fields in which Lone Star owns the mineral rights, the latter constituting a part of the Company's bituminous coal reserves which are maintained to assure a continuing supply of this vital raw material.

In January 1972 Lone Star acquired the Starlight mine near McCurtain, Oklahoma. The mine was initially operated by the River Corporation under a contract with Lone Star. The miners were covered by the terms of the 1971 National Bituminous Coal Wage Agreement (the national agreement) to which the River Corporation was a signatory. In April 1973 Lone Star began to mine the Starlight coal with its own employees and agreed to abide by the terms of the national agreement, with some exceptions not here relevant.[1] (R. 1158).

The national agreement was to expire by its own terms on November 12, 1974. By letter dated September 9, 1974, the Union informed Lone Star and all other independent signatories of its intention to terminate the 1971 wage agreement and requested that they execute a memorandum agreement expressing their intent to be bound by the terms of any successor national

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[1] Lone Star was not a member of the Bituminous Coal Operators' Association (herein "BOCA"), and it agreed to abide by the provisions of the contract only insofar as they applied to the Starlight mine as an independent coal operator. (R. 14, 653, 731-32, 931-32).

agreement negotiated by the Union and the BCOA.[2] Lone Star declined by a letter dated September 30 but offered to meet and negotiate a new contract separately. When no agreement was reached by November 12 Lone Star employees at the Starlight mine joined others in a nationwide economic strike. (R. 1159; 19-20).

On December 5, 1974, the Union and the BCOA executed a new national agreement. The National Bituminous Wage Agreement of 1974 contained two provisions, herein called the "successorship" clause and the "application of contract" clause, which have given rise to the instant dispute. The successorship clause is a new provision set forth in Article I of the agreement:

> In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement. (R. 1160, 771).

The application of contract clause was carried over from the preceding national agreement and is set forth in Article II, section (f), of the new agreement:

> As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agree-

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[2] By letter dated November 4, 1974, Union President Arnold Miller forwarded the Union's contract proposals and requested a reply no later than November 8. (R. 738). Lone Star received the letter on November 6, but did not respond to it. (R. 18-19).

ment) be put into production or use. (R. 1160; 709, 772).

Lone Star declined to accept the terms of the new national agreement and its Starlight mine employees remained on strike. On December 13, the first in what was to become a series of meetings between the parties was held in an effort to reach an accord.[3] On January 3, 1975, another negotiating session was held during which the parties reached an interim agreement, subject to ratification, providing for the employees to return to work for a 60-day period in order to facilitate negotiations.[4] Ratification ensued and Lone Star's employees returned to work on January 6.

At the first meeting under the "truce" on January 20 the Union presented a draft of a letter expressing its interpretation that the application of contract clause would come into effect only if the Union first became the properly designated bargaining representative of the majority of employees at other locations.[5] Additional negotiating sessions were subsequently held, but the parties remained divided on several critical issues and

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[3] At this meeting, Howard Jensen, petitioner's Vice President, objected to a number of provisions in the national agreement, including provisions for a cost of living escalator and for payment of royalties on non-union coal, in addition to the successor and application of contract clauses.

In a letter dated December 19 Lone Star forwarded the Union a proposed substitute for the cost of living escalation clause. The Union advised Lone Star by mailgram dated December 30 that it was prepared to accept this substitute if Lone Star accepted the remainder of the national agreement.

[4] Lone Star again emphasized at this meeting that it was not agreeable to the successor and application of contract clauses.

[5] Jensen's response was that Lone Star still would not accept the clause, notwithstanding the Union's interpretation. The meeting ended in disagreement on the subject. (R. 35-36).

the strike was resumed on March 8.[6]

On March 5 Lone Star filed unfair labor practice charges against the Union alleging that the successorship clause violated the "Hot Cargo" provisions of §§8(e) and 8(b) (4) (A) of the Act, 29 U.S.C. §158(e) and §158(b) (4) (A) (1976). The charges were amended on March 14 and April 8 to include the most recent strike activities and the further refusal to bargain allegations based on the Union's proposals.[7] One final bargaining session was held in Dallas in September 1975, but once again the parties failed to reach an agreement and the strike continued.[8]

b. The Board's rulings

The Board found that the successorship clause was not proscribed by the §8(e) hot cargo provision of the Act and that the

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[6]Lone Star had previously sought a 7-day extension of the truce period and the Union representatives apparently agreed to recommend such an extension to the local union. However, the majority of employees refused to continue to work without a contract.

It should be emphasized that on the two other occasions on which meetings were held during the truce period the parties remained in disagreement on the successorship and application of contract clauses.

[7]The Union had forwarded Lone Star its "complete proposal" in the form of a proposed addenda to the national agreement by letter dated March 3. That same day Union president Miller sent Lone Star a letter confirming the limitation on the application of contract clause. Lone Star rejected the proposals on March 5 by telegram. By telex dated March 10 the Union declared that it was "stand[ing] firm" on the rejected proposals but that it "[stood] ready to meet . . . and bargain at any mutually convenient time." Lone Star sent a telegram in response stating that in view of the strike, the status of negotiations, and the Union's avowed intent to stand firm, the parties had reached an impasse and it was withdrawing the proposals it had submitted to date. Lone Star did agree, however, to consider any new proposals made by the Union.

[8]At this meeting the Union proposed to suspend operation of the successorship clause pending a determination of its legality by the Board or a reviewing court.

Union therefore did not violate §8(b) (4) (A) by striking to compel Lone Star's acceptance of the clause. Specifically, the Board found that the operation of the Starlight mine was separate and distinct from Lone Star's other activities as a steel producer; that any successor would likely retain the same employees; and that the sale or transfer of the Starlight mine would merely substitute one entity for another while the business continued to operate without interruption, and therefore would not constitute "doing business" within the meaning of §8(e). The Board further found that since the successorship clause would effectively assure the survival of the Starlight mine employees' previously negotiated wages and working conditions, it vitally affected the miners' terms and conditions of employment and was therefore a mandatory subject of bargaining. The Union was thus entitled to insist upon the clause to the point of impasse and did not run afoul of §8(b) (3) of the Act by striking to obtain it.

The Board also found that the application of contract clause vitally affected the terms and conditions of employment of the bargaining unit employees at the Starlight mine because it protected the jobs and work standards of those employees by eliminating economic incentives which might otherwise encourage Lone Star to transfer work to other mines within its control. Since the clause was a mandatory subject of bargaining, the Union did not violate §8(b) (3) of the Act by striking to compel its acceptance.[9]

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[9]The ALJ had found that the clause would not operate to affect the terms and conditions of employment of the employees in the bargaining unit and was therefore not a mandatory subject of bargaining:

> I simply do not see how applying this contract to another facility of the company, should it be created and should the Union be successful in gaining recognition rights, would have any bearing on the

Note 9 – *Continued on next page*

Accordingly, the Board dismissed the complaint in its entirety.[10] We deal with the reasoning underlying these rulings as we discuss the two controversial clauses, to which we now turn.

II

THE SUCCESSORSHIP CLAUSE

The ALJ found that the successorship clause was not within the prohibition of §8(e),[11] relying on the Board's decision in *International Union of Operating Engineers, Local No. 701, AFL-CIO (Cascade Employers Association, Inc.),* 221 NLRB 751, where a clause of substantially similar import was upheld.

Note 9—*Continued*

wages, hours and other terms and conditions of unit employees.

(R. 1128). Further, he concluded "that the principal purpose for the . . . clause is as an organizing device," and was therefore not a mandatory subject of bargaining. (R. 1128).

The Board disagreed, finding that application of an entire collective bargaining agreement to non-unit employees does not necessarily reveal a disguised intention to promote the Union's organizational interests, especially in view of the fact that it would operate only if the Union is recognized by an employer or certified by the Board as the collective bargaining representative of the non-unit employees. Moreover, the Board found that the fact that the Union might have sought a more carefully tailored provision addressed solely to the protection of unit employees, as suggested by the ALJ "does not render the subject matter of *this* clause any less vital to the employees' interests." (R. 1166). (Emphasis in original).

[10]Member Walther, dissenting in part, was of the opinion that neither the successorship clause nor the application of contract clause was a mandatory subject of bargaining and that the Union had violated §8(b) (3) of the Act by striking to compel Lone Star to accept the clauses. (R. 1168-75).

[11]Section 8(e), 29 U.S.C. §158(e) (1970), in relevant part provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person. . . .

A majority of the Board in that case opined that notwithstanding the sale of the company's capital assets, the business enterprise survived and was the same employing industry.

A careful examination of the legislative history[12] convinced the majority that the sale or transfer of an entire business enterprise is not generally viewed as "doing business" within the meaning of §8(e). Thus, unlike an agreement to refuse "to deal in 'hot goods,' 'unfair materials,' or 'blacklisted' products, or an agreement to withhold services from an 'unfair' employer, the primary concerns of Congress in legislating [Section 8(e)]," a change in ownership would still find the company engaging in its normal business and its relationship with customers and suppliers would not necessarily be affected. *Id.* at 753. Accordingly, the ALJ found that Lone Star was "doing business" in steel, not in selling coal properties, and that the Starlight mine would be the same employing entity in spite of a change in ownership.

The Board sustained the finding of the ALJ in this regard, relying on its more recent decision in *District No. 71, International Association of Machinists and Aerospace Workers, AFL-CIO (Harris Truck and Trailer Sales, Inc.)*, 224 NLRB 100 (1976),[13] where it had occasion to consider similar issues in the context of a sale of a portion of a business enterprise. The

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[12]The legislative history reveals that §8(e) was designed to protect neutral employers and their employees from economic coercion designed to give a union victory in a labor dispute with another employer. More specifically, Congress sought to prevent a Union from using the collective bargaining agreement as a means to exert pressure on a neutral employer, thereby interrupting the actual or potential business relationship between the neutral employer and the employer deemed unfair by the Union. 221 NLRB at 752.

[13]*Harris Truck* was decided after the ALJ issued his decision in this case.

employer who operated as a franchised dealer for a number of major manufacturers of trucking equipment and trailers was a party to a collective bargaining agreement which contained a provision similar to the successorship clause in the instant case. Once again the Board rejected a literal interpretation of §8(e) and held that the sale of two of the three retail facilities did not constitute "doing business" within the meaning of §8(e).

The Board found that the instant case is similar to *Harris Truck,* that Lone Star's operations at the Starlight mine were separate and distinct from its activities as a steel producer, and that based on past experience the mine employees would in all likelihood continue in their jobs if the mine was sold. The Board concluded that the sale or transfer of coal properties would merely substitute one entity for another while the business continued without interruption and that such a transaction would not be within the Act's protection.

Lone Star argues that the Board erred because (1) the tests set out in the statute and cases demonstrate that §8(e) covers the sale of assets; (2) even if §8(e) does not normally cover asset sales, this case fits within the exception carved out by the Board and the Second Circuit in *National Maritime Union of America AFL-CIO; Commerce Tankers Corp.,* 196 NLRB 1100, *enf'd,* 486 F.2d 907 (2d cir.), *cert. denied,* 416 U.S. 970 ; and, (3) the successor language does not prohibit only asset sales and, when viewed with other provisions, prohibits leasing, subcontracting and other forms of "doing business" within the meaning of §8(e). We find Lone Star's arguments unpersuasive.

a. Section 8(e)'s coverage.

Lone Star's argument that asset sales are within the coverage of §8(e) begins with the observation that the statutory

language provides two distinct and alternative tests for finding a violation—the first prohibiting an agreement by an employer to "cease or refrain from handling, using, selling . . . or otherwise dealing in any of the products of any other employer;" the second prohibiting an agreement by an employer to cease doing business with any other person."

1. The "products" test. Lone Star contends that it is against precedent to hold that a capital asset cannot be the "product" of either a primary or secondary employer, and relies upon cases in which §8(e) was held to prohibit an agreement by a primary employer to transfer its milk routes (a capital asset) only to union signatories.[14] Lone Star also urges us to read the "products" test from the viewpoint of the secondary employer, and argues that even if the coal operations are a capital asset to Lone Star, they would conceivably be a "product" to a company whose business was that of leasing and operating coal lands. Further, Lone Star says that the Board's decision here has improperly held that the sale of raw materials is not within the coverage of §8(e).

We feel that the cases involving delivery routes are not controlling as the agreements found unlawful therein were directed to leasing or subcontracting, not the sale of delivery routes. Unlike the "one-shot" sale of capital assets contemplated by the instant clause, a lease or subcontract creates a continuing relationship, and if such agreements are restricted to concerns recognizing the Union, the signatory-producer becomes enmeshed in the Union's dispute with non-signatory

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[14]See, *N.L.R.B. v. Milk Drivers Local 753, IBT (Korth Transportation Co.)*, 392 F.2d 845 (7th Cir.]; *N.L.R.B. v. Joint Council of Teamsters No. 38*, 141 NLRB 341, *enf'd*, 338 F.2d 23 (9th Cir.); *Meat and Highway Drivers, Local 710, IBT v. N.L.R.B.*, 335 F.2d 709 (D.C.Cir.).

distributors. *N.L.R.B. v. Joint Council of Teamsters, supra,* 338 F.2d at 29.[15] In *Meat and Highway Drivers Local v. N.L.R.B., supra,* the court observed that the use of subcontracting clauses as leverage to require secondary firms to become union signatories was the kind of pressure Congress intended §8(e) to outlaw. 335 F.2d at 718. In contrast, when all or part of a business is sold, there may be no business relationship between the two employers either before or after the sale. Under such circumstances we feel there is no real danger of enmeshing the seller in a Union dispute with the purchaser.

We note that in one case dealing with milk deliveries the court found the "product" was the delivery services furnished by the secondary employers, not the milk routes transferred by the primary employer. *N.L.R.B. v. Joint Council of Teamsters, supra,* 338 F.2d at 25.[16] Thus, even applying the "products" test from the viewpoint of the secondary employer, it is the "product" produced, furnished, or offered by such employer that is relevant.

Finally, nothing in the Board's decision suggests that the sale of raw materials would be made exempt from the coverage of §8(e). Lone Star uses coal mined on its lands as a raw material in the production of steel. The raw material is coal, not the lands from which it is mined. The successorship clause which is upheld does not restrict the company's right to buy or sell coal.

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[15]The court noted that since the signatory-employer produced the majority of dairy products in the area, the agreement would have made it practically impossible for non-signatory distributors to resist union demands. 338 F.2d at 29.

[16]The court also found the agreement unlawful under the "doing business" test. 338 F.2d at 26-27.

2. The "cease doing business" test. Lone Star argues that consideration of "products" is not required under the "cease doing business" test and that in ruling otherwise, the Board not only erred, but also overlooked the fact that the "cease doing business" language was added to §8(e) for the very purpose of avoiding a possible limitation upon the subject matter of the agreements prohibited.

We are satisfied that the holding of the Board is consistent with Congressional intent. As originally offered by Senator Gore, §8(e) made it an unfair labor practice for labor unions and common carriers to enter into agreements by which the latter agreed to "cease or refrain from handling or transporting any of the products of any other employer." II Leg. Hist. of the Labor Management Reporting and Disclosure Act of 1959, 1162-63 [hereinafter Leg. Hist.], discussed in *N.L.R.B. v. Joint Council of Teamsters, supra,* at 27. The legislative history demonstrates concern that common carriers were being forced by the Teamsters Union to accept contracts containing hot cargo provisions. I Leg. Hist. 475, 778-79, 838; II Leg. Hist. 1007, 1162-63. Senator McClellan proposed the addition of the "cease doing business" language, fearing that contracts containing that language would be used to circumvent the first prohibitory clause. *Id.* at 1162-63. Considering both clauses and the legislative history we find no indication that Congress was concerned with agreements by common carriers or employers in other industries relating to the sale of their business or of assets as was done here.

b. The Commerce Tankers exception

Lone Star argues that the instant case is like *Commerce Tankers, supra,* where the Board found violative of §8(e) a provision in a collective bargaining agreement requiring that any

purchaser of a vessel adopt the terms of the agreement. The employer owned and operated freight ships for use in the transportation of goods and commodities. In reaching the conclusion that buyers and sellers of ships in the maritime industry were "doing business" within the meaning of §8(e), the Board relied on evidence that the sale of vessels was a common occurrence in the normal course of business.[17] The Board declined to rule on the question whether §8(e) would apply to the sale of capital assets in other industries or in other circumstances. 196 NLRB at 1101.

Similarly in enforcing the Board's order in *Commerce Tankers* the Second Circuit accepted the Board's finding that buyers and sellers of ships were "doing business" in the maritime industry, but expressed doubt that the isolated sale of a capital item, such as a ship, fit within either the language of the statute or Congressional intent. The court expressly declined to pass on the question for the future. 486 F.2d at 907. The Board's opinion pointed out that the transaction did "not represent a novel situation," 196 NLRB at 1101, but rather was one of a series of similar transactions. Consequently, the contractual restriction posed a danger of disrupting what might otherwise have been an ongoing business relationship extending beyond the sale of a vessel.

By contrast, here it was not established that sales of coal properties are a common occurrence in the normal course of business in the steel industry or in that of Lone Star.[18] Rather,

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[17]The Board distinguished its decision in *Commerce Tankers* on this basis in *Cascade Employers* and *Harris Truck, supra,* 221 NLRB at 752-53; 224 NLRB at 103.

[18]Lone Star argues that the record clearly demonstrates that the sale of coal lands was not uncommon. (Petitioner's Reply Brief at 20, n.7). It contends

Note 18—*Continued on next page*

the evidence shows that the Company purchases coal lands and holds them on a long-term basis to insure an adequate supply of coal for use in its steel manufacturing process, not that it is in the coal business. (R. 1157; 73-74, 159-60). Moreover, if the Company did sell the mine the new owner would probably be in the business of mining coal, but not necessarily in the business of manufacturing steel. The successorship clause would not prevent the sale of coal to Lone Star. Both the company's business and operation of the mine would continue without interruption of any actual or potential business relationship; only the ownership of the mine would have changed.

The Third Circuit recently upheld an identical clause against an attack under §8(e) by an employer engaged in the business of mining coal in *Amax Coal Co. v. N.L.R.B.*, 614 F.2d 872, 886 (3d Cir.), stating:

> [I]t is clear that the sale by Amax of all or part of its business operations would involve no continuing relationship with the purchaser. There is therefore no possibility of involving Amax in a labor dispute between the purchaser and its employees.

We agree that the sale of the Starlight mine would be more akin to the sale of a portion of a business entity, see *Harris Truck, supra,* than to the sale of a ship in *Commerce Tankers.*

Note 18—*Continued*
that the Union's chief negotiator testified that coal operations are bought and sold and that this was the primary reason for the Union's insistence on the clause. This testimony is characterized as evidence of "industry practice." *Id.* at 26, citing (R. 610).

We cannot agree. First, the company's contention that sales of such coal properties are not uncommon is not well supported by the record. Moreover, even if we treat the record as showing that occasional sales occur in such circumstances, this would be far short of the evidence relied on by the Board in *Commerce Tankers, supra,* 196 NLRB at 1100-01.

c. The scope of the successorship clause

Lone Star further argues that the successorship clause on its face applies to subcontracting and leasing out, not merely to sales of "covered operations," so as to bring it within §8(e).[19]

We cannot agree. The language refers to selling, conveying, or otherwise transferring or assigning; leasing and subcontracting are nowhere mentioned. Moreover, selling and conveying are permanent in character and under the rule of *ejusdem generis* "otherwise transferring or assigning" should be viewed as referring to other means of permanently transferring property, rather than to leasing or subcontracting which are temporary in character.

It is true that the rule of construction is subject to the limitation that if it is possible to give reasonable effect to both the general and special provisions, both are to be retained. *Colorado Milling & Elevator Co.*, 382 F.2d 834, 837 (10th Cir.). However, we feel that the successorship clause must be read in connection with other provisions in the contract which impose specific restrictions on the leasing, subleasing, and licensing out of coal lands, and the subcontracting of unit work. (R. 772). These specific restrictions, which do not require a lessee or subcontractor to assume the entire contract, would be mere surplusage if the successorship clause applied to a lessee or subcontractor.

We hold that the Board properly read the successorship clause as applying only to the kind of permanent disposition of assets that is outside the scope of §8(e).

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[19]The pertinent portion of the clause provides that the

> "[e]mployer promises that its operations covered by this agreement shall not be sold, conveyed, or otherwise transferred or assigned. . . ."

d. The successorship clause as a mandatory subject of bargaining

Section 8(b) (3) of the Act, 29 U.S.C. §158(b) (3), makes it an unfair labor practice for a union "to refuse to bargain collectively with an employer. . . ." Of course, the duty to bargain extends only to mandatory subjects, "wages, hours, and other terms and conditions of employment." *NLRB v. Wooster Division of Berg-Warner Corp.*, 356 U.S. 342, 349; 29 U.S.C. §158(d). Here the Board agreed with the ALJ that the successorship clause was a mandatory subject:

> [W]e are persuaded that a successor's assumption of any collective bargaining agreement negotiated between the Union and Lone Star would be vital to the protection of Starlight employees' previously negotiated wages and working conditions, as it is clear that the general rules governing successorship guarantee neither employees' wages nor their jobs. In view of the foregoing, we agree that the Union's insistence upon including in any agreement reached a provision which would assure the survival of the fruits of collective bargaining, in the event Lone Star thereafter should dispose of the Starlight mine, is not violative of the Act, as an agreement in this regard would vitally affect the terms and conditions of employment of the miners who survive such a change in ownership. (R. 1164).

Lone Star argues that the Board (1) misconstrued the "vitally affects" test for mandatory subjects of bargaining, and (2) departed from both its own prior holdings and strong indications of the Supreme Court that the "decision" to sell a business is a managerial prerogative, not subject to §8(d) of the Act. We cannot agree.

1. The "vitally affects" test: In *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate*

Glass Co., Chemical Division, 404 U.S. 157, 178, the Court defined a subject for mandatory bargaining as including only those issues that settle an aspect of the employer-employee relationship. Although matters involving individuals outside the employment relationship do not normally fall within that definition, they are not entirely excluded. The test is "not whether the third-party concern is antagonistic to or compatible with the interests of bargaining unit employees, but whether it *vitally affects* the 'terms and conditions' of their employment." 404 U.S. at 179. (Emphasis added). The Board applied this test in concluding that the successorship clause was a subject for mandatory bargaining.

Lone Star argues that the Board's application of the "vitally affects" test was erroneous because it failed to consider the effect on Lone Star's freedom to conduct its business.[20] This factor was discussed by the Court in *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272, and Lone Star contends that the successorship clause would do what the Court sought to avoid there—saddle a potential purchaser with Lone Star's contract—thereby inhibiting Lone Star's freedom to dispose of capital assets.Lone Star relies on *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO,* 417 U.S. 249, saying that there the Court declined to order a purchaser to be bound by the substantive terms of its predecessor's collective bargaining agreement. In sum, Lone Star urges us to hold that (1) any restraint on the free transfer of capital must be taken into account, and (2) because the Court was unwilling to

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[20] *Pittsburgh Plate Glass* makes clear that application of the test does not "[turn] only on the impact of the third-party matter on employee interests. Other considerations, such as the effect on the employer's freedom to conduct his business, may be equally important." 404 U.S. at 179, n.19.

allow the imposition of such restraints in the "successor" cases, that rationale precludes the Board doing so here where the focus is on a predecessor.

The classification of bargaining subjects as "terms or conditions of employment" is a matter of special Board expertise. *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 685-86. Its judgment as to what is a mandatory bargaining subject is entitled to considerable deference. *Ford Motor Co. (Chicago Stamping Plant) v. NLRB*, 441 U.S. 488, 495. We cannot say that in applying the "vitally affects" test here so as to assure survival of the previously negotiated wages and working conditions of the Starlight mine employees the Board "neglected to give the adverb its ordinary meaning." *Pittsburgh Plate Glass, supra*, 404 U.S. at 182. At the ALJ's hearing, Mr. Bank, a Union representative throughout the negotiations, described the consequences of a sale by Lone Star without the successorship clause (R. 607):

> [F]rom the point of view of the men at the mine it would be a tragedy, especially in this case where they had to stay out to get an agreement. They'd have an agreement signed and then they'd have Lone Star to go out and sell to somebody. He wouldn't honor the UMWA agreement and they'd have to start all over again.

Moreover in *Pittsburgh Plate Glass* the Court merely stated that "the effect on the employer's freedom *may* be equally important." 404 U.S. at 157, n.19. (Emphasis added). To accept Lone Star's contention would mean that an employer's freedom to rearrange his business would not be balanced here by some protection to the employees from a sudden change in the employment relationship. See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549. We are satisfied that the Board

struck a proper balance here in applying the "vitally affects" test.

Lone Star relies heavily on *NLRB v. Burns International Security,* 406 U.S. 272.[21] *Burns* held that the law imposes no obligation on a successor-employer to honor the substantive terms of a collective bargaining agreement negotiated by its predecessor where the successor has not agreed to do so.[22] The Court recognized that compelling an employer to assume its predecessor's collective bargaining agreement might inhibit the transfer of capital. Nevertheless, safeguarding the free flow of capital was not the Court's primary concern in *Burns.* The main concern seems to have been with the fundamental policy of freedom to negotiate embodied in §8(d) of the Act, which precludes the Board from compelling a party to agree to a contractual provision against its will. 406 U.S. at 282-84. Indeed,

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[21] Lone Star's contention that the Board failed to consider the effect on its freedom to conduct its business is apparently based on the treatment which the Board accorded *NLRB v. Burns International Security, supra,* in its decision (R.1164 n.13):

> That case is inapposite here . . . inasmuch as it dealt with the question of whether a successor's freedom was restricted by operation of law (i.e., whether a successor was automatically bound to the terms of a pre-existing agreement), whereas the issue herein is whether voluntary restrictions upon the freedom of the predecessor (the seller) may be insisted upon by a union.

Loan Star argues that this distinction is merely an effort to sidestep *Burns.* (Petitioner's Brief at 34, Reply Brief at 18.) A more reasonable interpretation of the Board's decision is that it *did* consider that the successorship clause might impose the kind of restraint on Lone Star's freedom to conduct its business that was rejected in *Burns,* but struck the balance here in favor of protecting the interests of the employees. As the following discussion will demonstrate, we also feel that Lone Star's reliance on *Burns* is misplaced.

[22] *Burns* was held, however, to have a duty to bargain with the incumbent union arising from its voluntary takeover of a recently certified bargaining unit which remained largely unchanged. 406 U.S. at 277-81; 287.

the Court emphasized in *Burns* that the company had not manifested its intent to assume the obligations of the contract and found that "allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *Id.* at 287, quoting *H. K. Porter Co. v. NLRB,* 397 U.S. at 108.

We cannot agree that the restraint on the free transfer of capital assets is the same when effected by agreement as when imposed by a Board order. In holding that a successor employer was not bound by operation of law to assume its predecessor's obligations, the Court observed in *Burns* that a successor might be bound by other means (406 U.S. at 291):

> In many cases, of course, successor employers will find it advantageous to observe the pre-existing contract rather than to face uncertainty and turmoil. Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or *assets purchase,* the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract. (Emphasis added).

Lone Star's reliance on *Howard Johnson Co. Inc. v. Detroit Local Joint Executive Board, et al,* 417 U.S. 249, is also misplaced. The case merely held that since *Burns* established that a purchaser of a business was not obligated by law to hire any of its predecessor's employees, the Union was precluded from circumventing that holding by bringing suit under §301 to compel arbitration, rather than instituting an unfair labor practice proceeding. 417 U.S. at 262. As in *Burns*, the Court was not ruling on a case where there was an agreement that a successor would be bound by the previous bargaining contract.

Thus we conclude that the Board did not err in its application of the "vitally affects" test.

2. "Decision" v. "Effects" Bargaining: Lone Star argues that the Board departed from its ruling in *General Motors Corp., GMC Truck & Coach Division,* 191 NLRB 951, *petition for review denied,* 470 F.2d 422 (D.C. Cir.), where the Board held that a General Motors decision to sell a retail facility was not a mandatory subject, although the company was obligated to bargain over the effects of the decision on unit employees. Lone Star also relies on language in *Fibreboard Paper Products Corp. v. N.L.R.B.,* 379 U.S. 203, to the effect that the decision to sell all or part of a business is a prerogative of management, not subject to §8(e) of the Act. Lone Star insists that the successor language "inhibits the decision making process . . .," (Petitioner's Brief at 36), and therefore cannot be viewed as an "effect."

We cannot agree. First, we feel that *General Motors Corp.,* is inapposite since there, on learning of the company's impending sale of one of its retail truck outlets, the Union insisted on bargaining *prior* to any change in ownership. The court upheld the Board's determination that the company's decision to sell was not subject to mandatory bargaining. The business decision was involved. 470 F.2d at 425. Here the successorship clause implicates the effect of the decision, rather than the decision itself. Under the proposed contract Lone Star would still be free to dispose of its coal properties as it desired, without first bargaining with the Union. On the other hand the effect would be that the employees are assured that the fruits of collective bargaining would survive a change in ownership.

We are not persuaded that the Board erred in its ruling that the successorship clause was a mandatory subject, fairly balancing the rights of the employer and the employees. See *Morrison*

Cafeteria's Consolidated, Inc. v. N.L.R.B., 431 F.2d 254, 257-58 (8th Cir.). Concluding that the clause was not unlawful and was a mandatory subject, we will sustain the part of the Board's order concerning the successorship clause and dismissing petitioner's complaint with respect thereto.

III
THE APPLICATION OF CONTRACT CLAUSE

As stated, the application of contract clause, as modified by the Union interpretation,[23] would require automatic application of the national agreement to any of the Company's coal-producing facilities presently owned or hereafter acquired, including those of subsidiaries and affiliates, upon recognition or certification of the Union as the employees' bargaining representative.

In reaching his conclusion that the clause was a non-mandatory subject, the ALJ found that the scope of the clause was overly broad and that its objectives could have been accomplished by less drastic means:

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[23] As related earlier, see p. 5 and note 5, *supra*, the interpretation was introduced by a Union letter on January 20, 1975, in order to clarify the Union's interpretation that the clause would come into effect only if the Union first became recognized or certified as the bargaining representative of the majority of the employees at other locations. The ALJ stated that "[t]he Union recognizes that as written, the application of contract clause could lead to an unlawful implementation." (R. 1123). However, he went on to state that the clause, "as modified by the Union, sufficiently protects the Section 7 rights of the prospective new employees. It is not alleged to be unlawful, and I conclude it is not" (R. 1127). The Board ruled on the clause as interpreted by the Union. (R. 1166). However, as stated in note 5, *supra*, Lone Star refused to accept the clause, despite the Union interpretation.

There is a dispute between the parties over whether the legality of the original clause is properly before us for review. However since the clause, even with the interpretation, is held to be a non-mandatory subject for reasons that follow, we need not resolve the procedural dispute.

> Unit standards could be protected simply by a clause requiring Lone Star, should it open a new mine, to pay employees no less than the wages set forth in the contract. It could do so without the contract automatically and in every respect applying to the new operation as the proposed clause does. Further, the clause could operate in areas not necessarily competitive with the work unit employees are doing, e.g., coal preparation facilities as opposed to mining; and to that extent it goes beyond protecting unit work and standards.
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> * * *
>
> A fair interpretation of this clause, along with Bank's testimony, is that a principal purpose for the application of contract to coal lands is to facilitate organizing.

(R. 1126).[24] Accordingly, the ALJ concluded that the clause did not "vitally affect" the unit employees and was not a mandatory subject (R. 1128):

> . . . [T]o agree in advance concerning the terms and conditions of employment of nonexistent employees in a new and nonrelated facility does not particularly relate

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[24] Mr. Banks testifed as follows (R. 629):

> Q: Did you state whether the purpose of Article Two, Section (i) is an organizing tool?
>
> A: No. There was discussion at the table about the fact that it was obviously attractive in the terms of organizing, but he was told quite clearly, yes. Now, subsequently a major concern with the section was to insure as far as the UMWA possibly could that no mines would be developed that were under our jurisdiction which would have terms and working conditions that were significantly less than what were existing at the Starlight, so that we could be assured that the people at the Starlight mine would not be put out of work because of poor development of this [sic] subsequently developed facilities.

> to wages, hours or the terms and conditions of employment of unit employees. I simply do not see how applying this contract to another facility of the company, should it be created and should the Union be successful in gaining recognition rights, would have any bearing on the wages, hours and other terms and conditions of unit employees.

The Board disagreed, finding that (1) the clause would protect jobs and work standards of unit employees by removing economic incentives to transfer unit work; (2) the fact that the Union could have sought more specific provisions "[did] not render the subject matter of *this* clause any less vital to the employees' interests;" (3) application of the entire collective bargaining agreement to non-unit employees, including its non-economic provisions, did not represent a disguised purpose to further the Union's institutional or organizational interests because the clause would become operative only if the Union is recognized or certified as the representative of other units. Having concluded that the clause was a mandatory subject, the Board ruled that the Union did not violate §8(b) (3) of the Act by striking to obtain it. (R. 1165-66) (emphasis in original).

Lone Star argues that the Board has misapplied the "vitally affects" test. The gist of the argument is that *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, and *Teamsters' Union v. Oliver*, 358 U.S. 283, carved out a limited exception which allows a subject dealing with matters outside the unit to be considered mandatory only where it would vitally affect job security, and only where the extra-unit language constitutes a direct attack on the perceived problem. Lone Star maintains that the instant clause is not within the exception and that the Board erred in rejecting the ALJ's findings that the test was not satisfied. On this clause, we are persuaded to agree with Lone Star.

In *Pittsburgh Plate Glass* the Supreme Court referred to its earlier decision in *Teamsters Union v. Oliver,* as an example of the kind of third-party concerns that vitally affect the terms and conditions of employment of bargaining unit employees. 404 U.S. at 178-79. *Oliver* held that a mandatory subject of bargaining was involved where an agreement required a carrier to pay a truck owner, who leased his vehicle to the carrier and then drove his truck in the carrier's service while receiving wages of drivers of carrier owned vehicles, a rental sufficient to cover the owner's cost of operating the truck. Without determining whether the owner-drivers were employees or independent contractors, see *United States v. Drum,* 368 U.S. 270, 382-83 n. 26, the Court found that the provision for a minimum rental was "a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract." 358 U.S. at 294. The provision was of vital concern to the carrier's own drivers because an inadequate rental might have encouraged a carrier to withdraw its vehicles from service, thus placing the employees' jobs in jeopardy. *Id.*

The General Counsel and the Union contend here that the application of contract clause protects the jobs and working conditions of unit employees from a danger similar to that in *Oliver.* They argue that the clause removes the Company's economic incentive to transfer work to another mine where the terms and conditions of employment might be inferior.[25] We cannot agree.

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[25] To support their argument, the Union and the Board's General Counsel cite testimony of the Union's chief negotiator at the hearing before the ALJ, including the following:

> We explained to Mr. Jensen this [the clause] was important

Note 25 – *Continued on next page*

The provision for the minimum rental in *Oliver* was carefully drafted to remedy a specific problem over which the parties had disagreed for seventeen years. 358 U.S. at 291-292. By contrast, the instant clause is not so directed. It is hard to read this language as a "direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective-bargaining contract." *Id.* at 294. This application of contract clause reaches all new operations and is much broader than necessary to accomplish the legitimate Union goal of protecting employees against a shift of production to another mine to evade standards and wages at the Starlight mine. The clause even requires that the agreement be put into effect *in toto* elsewhere, including the non-economic provisions having no bearing on the unit employees. *Amax Coal Co. v. N.L.R.B.*, 614 F.2d 872 884 (3rd Cir.).

We are mindful that we must accord considerable deference to the Board's judgment as to what is a mandatory subject. *Ford Motor Co. v. N.L.R.B., supra,* 441 U.S. at 495. However we are convinced that here the Board did not properly observe the two-prong requirement of *Oliver* that in order for a subject involving employees outside the unit to be considered mandatory it must vitally affect the terms and conditions of employment or the job security of unit employees and must represent a direct frontal attack on the problem threatening

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Note 25 – *Continued*

> because without the provision in the contract the company would be free to develop another mine and have it go UMWA, negotiate the terms and conditions of Employers [sic] which would be sub-standard in the sense that they would cost the company less and then develop that company very possibly to the detriment of the people in the unit at Starlight taking away their jobs. This has also happened before. That is why we were interested in that provision.

(R. 610).

such interests. See *Oliver, supra,* 358 U.S. at 294; *Pittsburgh Plate Glass, supra,* 404 U.S. at 178-179 and n. 18, 182. Here the implementation of the clause could only affect unit jobs if the company opened another mine. The Board ignored the ALJ's finding that application of the contract to other phases of coal production would have no bearing on unit jobs. And as noted the automatic application of the entire collective bargaining agreement, including its non-economic provisions, to other appropriate units employed at other facilities operated by the company does not represent the kind of direct frontal attack on the problem demanded by *Oliver.*

In sum, we conclude that the Board erred in holding that the applicatrion of contract clause was a mandatory subject of bargaining. Accordingly we hold that by striking to achieve agreement on a nonmandatory subject the Union refused to bargain within the meaning of §8(b) (3) of the Act.[26]

The order of the Board dismissing the complaint is sustained in part and set aside in part and the case is remanded for further proceedings, all in accordance with this opinion.

No. 77-1667—LONE STAR STEEL COMPANY v. NATIONAL LABOR RELATIONS BOARD and UNITED MINE WORKERS OF AMERICA

BARRETT, Circuit Judge, concurring in part and dissenting in part:

I fully concur with the majority's holding that the Board erred in ruling that the application of contract clause was a man-

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[26]The ALJ found that the clause is lawful and that if the parties had voluntarily agreed on its inclusion, it would have been enforceable. We express no opinion on this finding. We merely hold that it is not a mandatory subject of bargaining.

datory subject of bargaining.

I respectfully dissent from the majority's view that the Board did not err in finding that the language in the successorship clause of the contract is a mandatory subject of collective bargaining. I agree with the views expressed by dissenting member Walther and the finding/conclusion of the ALJ. In my view the successorship clause was not within the prohibition of §8(e).

APPENDIX B

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Jack R. Miller, Judge*

No. 77-1667

LONE STAR STEEL COMPANY
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

and

UNITED MINE WORKERS OF AMERICA
Intervenor

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the petitioner in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by Judges Holloway and Miller. Judge Barrett vote to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of

*Of the United States Court of Customs and Patent Appeals, sitting by designation.

the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS
Clerk

S/S Robert L. Hoecker

By: Robert L. Hoecker
Chief Deputy Clerk

APPENDIX C

FJMW

231 NLRB No. 88

D–2816

McAlester, Okla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 16–CB–924 and
16–CC–517

Case 16–CC–518

UNITED MINE WORKERS OF AMERICA

and

LONE STAR STEEL COMPANY

and

SURFACE INDUSTRIES, INC.

DECISION AND ORDER

On January 28, 1976, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, the General Counsel, both Charging Parties (Lone Star Steel Company and Surface Industries, Inc.), and the Respondent Union filed exceptions and supporting briefs. Answering briefs were filed by Lone Star and the Respondent Union.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to

affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein.[2]

We agree with the Administrative Law Judge that the Respondent Union did not engage in proscribed secondary conduct by picketing the operations of Surface Industries at the Pocahontas mine in an effort to force Lone Star Steel Company to accept its bargaining demands, as Surface Industries is an ally of Lone Star in the latter's labor dispute with the Union.

Likewise, we agree that the Union did not engage in unlawful conduct by striking to compel Lone Star's acceptance of the "successorship" clause as contained in the National Bituminous Coal Wage Agreement of 1974.

We disagree, however, with the Administrative Law Judge's holding that the Union refused to bargain in violation of Section 8(b) (3) of the Act insofar as it sought, by striking, to gain Lone Star's acceptance of the "application of contract" clause, as in our view the subject matter of that clause constitutes a mandatory subject of bargaining.

The relevant facts, more fully set forth in the Administrative Law Judge's Decision, are briefly summarized below.

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[1] Surface Industries, Inc., has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Charging Parties filed requests for oral argument. Their requests are hereby denied as, in our opinion, the record in this proceeding, including the parties' briefs, adequately presents the issues and the positions taken with respect thereto.

Lone Star Steel Company is a Texas-based manufacturer of steel products, principally pipe used in the oil and gas industry. In connection with its business, Lone Star consumes 36,000 to 40,000 tons of coal per month to make coke which, in turn, is used in the steelmaking process. Coal is obtained both from outside suppliers and from coal lands owned or leased by Lone Star, the latter being a part of the Company's bituminous coal reserves, which are maintained to assure an adequate supply of this vital raw material.

In January 1972, Lone Star acquired the Starlight mine near McCurtain, Oklahoma, for immediate exploitation of its bituminous coal of medium volatility. This was done to offset the loss of coal theretofore furnished by an outside supplier. Following this acquisition, and for more than 1 year, Starlight coal was mined by the River Corporation, under a contract with Lone Star. Work at the mine was covered by the terms of the 1971 National Bituminous Coal Wage Agreement, to which the River Corporation was a signatory. In April 1972, Lone Star itself took over operations at the Starlight mine and assumed, with some minor variances not here relevant, the aforesaid agreement which was terminable on or after November 12, 1974.[3]

About the same time, Lone Star began investigating other coal properties with a view toward acquisition of additional reserves, as a hedge against loss of high volatility coal sources which were deemed to be in questionable supply.[4] Investigations

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[3]The record shows that Lone Star had likewise been directly engaged in mining operations near Dow, Oklahoma, from the end of World War II through 1962.

[4]Lone Star uses a blend of medium and high volatility coal in its coking ovens.

centered on certain coal lands near Dow, Oklahoma, otherwise known as the Pocahontas prospect. On October 15, 1973, the Company entered into a 10-year renewable coal lease with the owner of those lands and in February of the following year began clearing the property to prepare it for mining. During the spring and summer of 1974 Lone Star entered into negotiations with potential mine operators and in July contracted with All Service Contractors, Inc., to mine the Pocahontas prospect.[5] This agreement aborted, however, as All Service was unable to obtain financing for required machinery and equipment and begin production within the specified time. Thereafter, a similar agreement was signed with Murray Construction Co., Inc., on October 22, 1974. Subsequently, with Lone Star's approval, this contract was assigned to Surface Industries, Inc., a spinoff corporation organized by the Murray brothers, who had no prior experience in the strip mining of coal, for the specific purpose of exploiting the Pocahontas mine.[6] Operations commenced in

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[5]According to his credited testimony, Johnny Enlow, a founder and vice president of All Service, inquired of Lone Star officials in the course of these negotiations, why they did not "do the jobs themselves because they had the men, the money, and machines to do the jobs . . . and thereby cut out the middle man." They advised Enlow that Lone Star sought an independent mine operator to assure continuous production in the event of an anticipated strike by UMWA employees upon termination of the current wage agreement on November 12.

[6]Enlow, who worked briefly for Surface as a mine superintendent, credibly testified that J. Paul Savage, Lone Star's director of coal properties, repeated the Company's reason for seeking an independent operator to mine the Pocahontas prospect at a conference between the Murray brothers and representatives of Lone Star, which he attended. Oliver "Bub" Murray himself testified that he "asked them why they wanted to take inexperienced people like us and put us in the coal business or give us a contract on a coal mine" and was told "they didn't want to tackle the responsibility or the personnel, which I understand today."

November and by the first week in December coal was moving from the mine.

Meanwhile, by letter dated September 9, 1974, the Union notified Lone Star of its intention to terminate the 1971 wage agreement on November 12 and requested that the Company formally agree to be bound by the terms of any successor national agreement negotiated by the Union and the Bituminous Coal Operators' Association. By letter dated September 30, Lone Star declined, but offered to meet and negotiate a new contract. No agreement was reached by November 12, and on that date Lone Star employees at the Starlight mine joined others in a nationwide strike. A national agreement was executed on December 5, 1974, but Lone Star was unwilling to be bound by its terms and its employees remained on strike as negotiations continued. On January 6, 1975, the parties entered into an interim agreement pursuant to which Lone Star employees returned to work for a 60-day period to facilitate negotiations. Bargaining continued, but the Company and the Union remained apart on several critical issues, and on March 8 the strike was resumed. Five days later, on March 11, Starlight miners appeared at the Pocahontas mine, near Dow, and began picketing with signs which read: "Lone Star on Strike for UMWA Contract." Surface employees refused to cross the picket line. One bargaining session was held several months after the strike resumed but the parties adhered steadfastly to their respective positions, no agreement was reached, and the strike continued.

Among other things, the Union insisted upon Lone Star's acceptance of two clauses, herein called the "successorship" clause and the "application of contract" clause which were negotiated into the National Bituminous Coal Wage Agreement of 1974.

The successorship clause, a new provision, is set forth in Article I of the aforesaid agreement and reads as follows:

> In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement.

The application of contract clause, carried over from the preceding national agreement, is set forth in Article II, section (f), of the agreement and reads as follows:

> As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use.

As set forth in the addendum to the Union's contract proposal, it is understood by all the parties that this clause becomes operative only if the Union is recognized by an employer or certified by the Board as the collective-bargaining representative of the employees involved. The Union's insistence upon Lone Star's acceptance of the above-quoted clauses and the strike, partly in support of those demands, gave rise to the instant proceeding.

Based on foregoing facts, the Administrative Law Judge held that the Union did not violate Section 8(b) (4) (A) of the Act by insisting that Lone Star agree to the successorship clause, as the clause itself did not fall within the proscription of Section 8(e). Specifically, he did not view transactions of the type con-

templated by the successorship clause, namely, the sale or transfer of coal properties, as covered by the "cease doing business with any other person" language of Section 8(e), thus distinguishing this case from *Commerce Tankers,*[7] wherein the Board found that the sale of vessels in the maritime industry was not a novel situation but a fairly common occurrence in the normal course of "doing business." Rather, the Administrative Law Judge found *Cascade Employers Association*[8] dispositive of the issues raised herein. In *Cascade* the Board concluded that the sale or transfer of an *entire* business enterprise is generally to be viewed, not as "doing business" within the meaning of Section 8(e), but rather as the substitution of one entity for another while the conduct of business continues without interruption.

Following issuance of the Administrative Law Judge's Decision herein, the Board had occasion in *Harris Truck*[9] to consider similar issues in the context of a transfer of a *portion* of a business enterprise. The employer in that case, who was a party to a collective-bargaining agreement which contained a provision similar to the successorship clause here in question, maintained a number of franchise dealerships for major manufacturers of trucking equipment and trailers. The Board held in that case that the selling off of two of its three facilities

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[7] *National Maritime Union of America, AFL-CIO; Commerce Tankers Corporation (Vantage Steamship Corporation),* 196 NLRB 1100 (1972), enfd. 486 F.2d 907 (C.A. 2, 1973).

[8] *International Union of Operating Engineers, Local No. 701, AFL-CIO (Cascade Employers Association, Inc., for and behalf of its Employer Member Tru-Mix Construction Co., Inc.),* 221 NLRB 751 (1975).

[9] *District No. 71, International Association of Machinists and Aerospace Workers, AFL-CIO (Harris Truck and Trailer Sales Inc.),* 224 NLRB 100 (1976).

was not "doing business" within the meaning of Section 8(e) even though the transaction did not result in a liquidation of the employer's entire enterprise. In so holding, the Board observed that the two dealerships in question operated as separate entities, each with its own cadre of employees who were immediately offered, and accepted, jobs with the new owners. Accordingly, the Board viewed the transferred operations as separate business enterprises, "not only surviving and continuing after a formal change of ownership but, further, as being in the same employing industry without any apparent disruption in the normal business relationships between the new owner and Harris Truck's former suppliers and customers."

The instant case is similar to *Harris Truck* in the foregoing respects. Lone Star operates the Starlight mine as a separate entity with a number of employees whose "tenure" at the mine extends beyond that of its owners. Further, based on past experience, it is likely that employees would continue in their jobs at the mine should Lone Star decide to sell to a successor. In these circumstances, we view the mining operations at the Starlight prospect as separate and distinct from Lone Star's other activities as a steel producer, and, given the "permanent" character of the miners' jobs at the Starlight prospect, we find that the sale or transfer of the mine by Lone Star would amount to no more than a substitution of one entity for another while the conduct of business continues without interruption, and therefore it would not be a transaction within the Act's protection. Accordingly, we agree with the Administrative Law Judge that the Respondent Union did not run afoul of the secondary provisions of the Act by striking to compel Lone Star's acceptance of the successorship clause.

Likewise, we agree that the Union did not, by engaging in such conduct, refuse to bargain in violation of Section 8(b) (3)

of the Act as, in our view, the subject matter of that clause constitutes a mandatory subject of bargaining and the Union is thus entitled to insist upon its acceptance to the point of impasse.

In *Pittsburgh Plate Glass,*[10] the Supreme Court defined a subject for mandatory bargaining as involving only those issues which settle an aspect of the relationship between the employer and his employees. Although recognizing that matters involving individuals outside the employment relationship do not normally fall within that definition, the Court recognized that they are not wholly excluded. The touchstone in such cases in "not whether the third-part concern is antagonistic to or compatible with the interest of bargaining-unit employees, but whether it *vitally* affects the 'terms and conditions' of their employment [emphasis supplied]."[11] The Court has found in certain instances that third-party concern did vitally affect the terms and conditions of employment of bargaining unit employees,[12] whereas in *Pittsburgh Plate Glass, supra,* it did not. The instant case is distinguishable from the foregoing in that the successorship clause does not purport to deal with *individuals* outside the employment relationship, but rather with successor employers, who are likewise outside that relationship. Notwithstanding this distinction, we are persuaded that a successor's assumption of any collective-bargaining agreement negotiated between the Union and Lone Star would be vital to the protection of

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[10] *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division,* 404 U.S. 157 (1971).

[11] *Id.* at 179.

[12] See, e.g., *Local 24, International Brotherhood of Teamsters, Chauffeurs, Warehousement and Helpers of America, AFL-CIO v. Oliver,* 358 U.S. 283 (1959), minimum truck rental for owner-operators; *Fibreboard Paper Products Corp. v. N.L.R.B.,* 379 U.S. 203 (1964), contracting out unit work.

Starlight employees' previously negotiated wages and working conditions, as it is clear that the general rules governing successorship guarantee neither employees' wages nor their jobs[13] In view of the foregoing, we agree that the Union's insistence upon including in any agreement reached a provision which would assure the survival of the fruits of collective bargaining, in the event Lone Star thereafter should dispose of the Starlight mine, is not violative of the Act, as agreement in this regard would vitally affect the terms and conditions of employment of the miners who survive such a change in ownership.

Contrary to the Administrative Law Judge, we similarly view the "application of contract" clause as involving a subject for mandatory bargaining. The Board has recognized that certain "after acquired" clauses, which involve individuals outside the employment relationship, vitally affect the interest of bargaining unit employees and therefore constitute subjects for mandatory bargaining. In *Kroger,*[14] the Board dealt with an employer's breach of a clause that would have had the effect of adding additional stores to a bargaining unit covered by a collective-bargaining agreement, upon presentation of evidence of a card majority among the new employees. It was found that the employer's failure to abide by that clause violated Section

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[13] See, e.g., *N.L.R.B. v. Burns International Security Service, Inc., et al.*, 406 U.S. 272 (1972). That case is inapposite here, however, inasmuch as it dealt with the question of whether a successor's freedom was restricted by operation of law (i.e., whether a successor was automatically bound to the terms of a preexisting agreement), whereas the issue herein is whether voluntary restrictions upon the freedom of the predecessor (the seller) may be insisted upon by a union. We are not considering or passing upon the issues of whether a union may lawfully act to compel compliance with such a provision or whether a successor employer would be bound by the terms of such an agreement.

[14] *Houston Division of the Kroger Co.*, 219 NLRB 388 (1975).

8(a) (5) of the Act. It is clear that such a finding is permissible only because the clause itself was deemed to involve a mandatory subject of bargaining. For as the Supreme Court stated in *Pittsburgh Plate Glass, supra,* the Act does not require continued adherence to permissive as well as mandatory terms; "The remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract . . . not in an unfair labor practice proceeding."[15] Thus, where an "after acquired" clause contemplates the accretion or absorption of employees into an existing unit, the matter constitutes a subject for mandatory bargaining.

In this case, however, the application of contract clause does not extend the terms of a collective-bargaining agreement to newly acquired employees by adding them to the existing unit. Rather, the clause would extend that agreement in its entirety to employees of Lone Star, and its subsidiaries and subordinates, who are concededly outside that unit. This distinction, in the opinion of the Administrative Law Judge, deals a fatal blow to the Union's position. We disagree. It is clear that this clause serves to protect the jobs and work standards of bargaining unit employees at the Starlight mine by removing economic incentives which might otherwise encourage Lone Star to transfer such work to other mines under its control. The fact that the Union could have sought other specific provisions addressed solely to the protection of unit employees in a manner which would remove economic incentives to the development of other mining facilities at the expense of the Starlight miners, as the Administrative Law Judge suggests, does not render the subject matter of *this* clause any less vital to the employees' interests. Nor can it be said that the application

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[15] 404 U.S. 157, 188.

of an entire collective-bargaining agreement to nonunit employees, including its noneconomic provisions, necessarily reveals a disguised purpose to promote the Unon's institutional or organizational interests. Indeed, as previously mentioned, the "application of contract" clause herein is understood to become operative only if the Union is recognized by an employer or certified by the Board as the collective-bargaining representative of the employees to be covered thereby. In view of the foregoing, we find that the application of contract clause here in question deals with a mandatory subject of bargaining and, accordingly, that the Respondent Union did not violate Section 8(b) (3) of the Act by striking in support of its demand that Lone Star agree to its inclusion in any collective-bargaining agreement reached. We shall, therefore, dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the compaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C. August 24, 1977

John H. Fanning,	Chairman
Howard Jenkins, Jr.,	Member
Betty Southard Murphy,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALTHER, dissenting in part:

I disagree with the majority's conclusion that the "successorship" and "application of contract" clauses constitute mandatory subjects of bargaining. Accordingly, I conclude that the Union refused to bargain in violation of Section 8(b) (3) of the Act by striking to compel Lone Star's acceptance of these clauses.

The Supreme Court has defined mandatory subjects of bargaining as those matters which settle some aspect of the relationship between the employer and his employees, or those matters which—although they concern individuals outside the employment relationship—nevertheless vitally affect the terms and conditions of employment of bargaining unit employees.[16] The majority states that the successorship clause passes the latter, or "vitally affects" test, for mandatory subjects of bargaining. In so concluding, the majority fails to consider that application of the vitally affects test to third-party concerns, such as the successorship clause, does not turn "only on the impact of the third-party matter on employee interests. Other considerations, such as the effect on the employer's freedom to conduct his business, may be equally important [Citation omitted]."[17] In this regard, it should be noted that a successorship clause will have a substantial effect on an employer's freedom to conduct its business and to dispose of its capital assets. The Supreme Court has described this effect as follows:

> A potential employer may be willing to take over a moribund business only if he can make changes in corporate

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[16] *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division,* 404 U.S. 157, 178-179 (1971).

[17] *Id.,* fn. 19 at 179.

> structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.[18]

The Court was unwilling in *Burns* to impose such restraints on the free transfer of capital and went on to hold that a successor employer is not bound by the substantive provisions of the collective-bargaining agreement negotiated by the predecessor employer.[19]

Under *Burns,* a successor of Lone Star will not be bound to observe the substantive provisions of any collective-bargaining agreement negotiated by Lone Star. However, by virtue of the successorship clause, if agreed to by Lone Star and thereafter complied with, a successor of Lone Star will be obligated to recognize and bargain with the Union and to assume, *in toto,* the burdens of the agreement. Thus, the successorship clause will achieve precisely what the *Burns* court sought to avoid – saddling a potential purchaser with Lone Star's collective-bargaining agreement – thereby inhibiting Lone Star's freedom to dispose of its capital assets. That the successorship clause achieves this result through a negotiated agreement rather than through the compulsion of a Board order, as was the case in *Burns,* does not make *Burns* inapposite here. The restraint on the free transfer of capital assets is as real when imposed by

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[18] *N.L.R.B. v. Burns International Security Services, Inc.,* 406 U.S. 272, 287-288 (1972).

[19] A successor employer, however, is obligated to recognize and bargain with an incumbent union in situations where it retains a majority of the predecesor's employees and the relevant bargaining unit remains unchanged. *Id.* at 281.

private agreement as it is when imposed by a Board order.

By denoting the successorship clause a mandatory subject of bargaining, the majority allows the Union to sidestep the *Burns* decision. The Union will be free to engage in economic warfare to compel Lone Star to agree to include the successorship clause in a collective-bargaining agreement. With the clause included in an agreement, Lone Star's freedom to dispose of its assets will be severely curtailed, accomplishing precisely what the *Burns* Court sought to avoid. For this reason, I cannot join the majority.

In addition, I do not believe that the successorship clause "vitally affects" the terms and conditions of employment of bargaining unit employees within the meaning of *Pittsburgh Plate Glass, supra,* and therefore is not a mandatory subject of bargaining. The majority states that "the Union's insistence upon including in any agreement reached a provision which would assure the survival of the fruits of collective bargaining, in the event Lone Star thereafter should dispose of the Starlight mine, is not violative of Act, as agreement in this regard would vitally affect the terms and conditions of employment of the miners who survive such a change in ownership." There is no requirement either in the collective-bargaining agreement or in the Act which would require a party which subsequently acquires the Starlight mine to employ former Starlight employees. It is therefore possible that the successorship clause, if and when it is applied, would benefit or restrict stranger employees rather than bargaining unit employees. Under such circumstances, it can hardly be said the successorship clause vitally affects the terms and conditions of employment of bargaining unit employees.

I also find it significant that the successorship clause requires a successor to assume the collective-bargaining agreement *in toto,* including noneconomic provisions which even my col-

leagues would have to concede do not vitally affect the terms and conditions of employment of bargaining unit employees. The proposed agreement, for example, contains noneconomic provisions for union recognition, union access to the mine, checkoff of union dues, use of bulletin boards by the Union, and the use of company bathhouses for meetings. While these provisions may vitally affect the Union as an institution and enhance its position as collective-bargaining representative, they do not vitally affect the terms and conditions of employment of bargaining unit employees. Accordingly, to the extent the successorship clause seeks to continue in effect the above-described provisions, the clause is not a mandatory subject of bargaining, and the Union therefore failed to bargain in violation of Section 8(b) (3) by striking to compel Lone Star's acceptance of the clause.[20]

Turning to the application of contract clause, I am able to agree with two aspects of my colleagues' discussion of this clause. They correctly note that (1) the Board has indicated that an "after acquired" clause is a mandatory subject of bargaining when the clause contemplates the accretion of employees—to be covered by the collective-bargaining agreement—into the existing unit,[21] and (2) the application of contract clause here does not contemplate such an accretion. I must, however, part ways with my colleagues when they conclude that this distinction does not deal a fatal blow to the contention that the application of contract clause vitally affects the terms and conditions of employment of bargaining unit employees. Since the clause will apply the proposed agreement to nonunit employees,

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[20] See *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1975).

[21] *Houston Division of the Kroger Co.*, 219 NLRB 388 (1975).

I do not believe it is a mandatory subject of bargaining. As the Administrative Law Judge below succinctly stated:

> I simply do not see how applying this contract to another facility of the company, should it be created and should the Union be successful in gaining recognition rights, would have any bearing on the wages, hours and other terms and conditions of unit employees.

My colleagues vainly attempt to save the clause as a mandatory subject of bargaining by finding that the "clause serves to protect the jobs and work standards of bargaining unit employees at the Starlight mine by removing economic incentives that might otherwise encourage Lone Star to transfer such work to other mines under its control." The clause, however, is not restricted to after acquired facilities competing with the Starlight mine. Rather, it would take effect and apply the proposed collective-bargaining agreement to an after acquired, noncompeting facility involved with some aspect of coal production other than mining. I do not understand how applying the contract to nonunit employees at an unrelated facility will protect the jobs and work standards of bargaining unit employees at the Starlight mine.

It is also significant that the clause does not utilize other, more precise, means to remove any economic incentive which otherwise might encourage Lone Star to transfer work to an after acquired facility competing with the Starlight mine. As suggested by the Administrative Law Judge below, the clause could have provided that should Lone Star engage in a competitive operation it would not pay substandard wages or fringe benefits to such employees. This suggested provision would accomplish the precise object which the majority states is crucial in making the application of contract clause a mandatory subject of bargaining, as it would require that the labor costs at a

competing operation match those at the Starlight mine. Such a precise and narrowly drawn clause, moreover, would be analogous to similarly precise and narrow third-party concern clauses which have been held to be mandatory subjects of bargaining. Illustrative is the clause in *Local 24, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL--CIO v. Oliver,*[22] which provided a minimal rental to be paid owner-operators. The Supreme Court held this clause was a mandatory subject of bargaining as its object was "to protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs."[23] As the application of contract clause here is neither precisely nor narrowly drawn to remove the economic incentives which otherwise might encourage Lone Star to transfer work to another mine under its control, I conclude that the clause does not vitally affect the terms and conditions of employment of bargaining unit employees within the meaning of *Oliver.*

It should also be noted that the application of contract clause, like the successorship clause, puts into effect the proposed collective-bargaining agreement, *in toto,* including the noneconomic provisions for union recognition, union access to the mine, union dues checkoff, union use of bulletin boards, and union use of bathhouses for meetings. It is clear that these provisions have no bearing on bargaining unit employees' terms and conditions of employment. To the extent the application of contract clause seeks to apply these provisions to after acquired

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[22] 358 U.S. 283 (1959).

[23] *Id.* at 293-294.

facilities, the clause is a nonmandatory subject of bargaining, and the Union therefore failed to bargain in violation of Section 8(b)(3) by striking to compel Lone Star's acceptance of the clause.[24]

Lastly, I believe the application of contract clause is not a mandatory subject of bargaining because it places an impermissible restraint on Lone Star's freedom to dispose of its assets. As discussed above in connection with the successorship clause, the Supreme Court in *Burns* has expressed a policy favoring the right of employers to dispose of capital assets free of the restraints which would arise if a successor employer were bound by the provisions of the collective-bargaining agreement negotiated by the predecessor employer. The application of contract clause implicates the same policy considerations underlying *Burns*. Assuming the application of contract clause is contained in a collective-bargaining agreement negotiated by Lone Star, its decision thereafter whether or not to acquire a new facility would occur under the shadow of that clause. In the absence of that shadow Lone Star might be willing to acquire a new facility as it would be able to make "changes in corporate structure, composition of the labor force, work location, task assignment and nature of supervision."[25] But the clause has the effect of "[s]addling [Lone Star] with the terms and conditions of employment contained in the old collective bargaining contract [which] may make these changes impossible and may discourage and inhibit the transfer of capital."[26] Accordingly, as was the case with the successorship clause, I conclude that, by

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[24] *Borg-Warner Corp., supra,* 356 U.S. at 349.

[25] *Burns, supra,* 406 U.S. at 287-288.

[26] *Id.* at 288.

denoting the application of contract clause a mandatory subject of bargaining, the majority allows the Union to thwart the policy of the *Burns* decision. As a result of the majority's decision, the Union will be free to engage in economic warfare to compel Lone Star to agree to include the clause in a collective-bargaining agreement. If the clause is so included, Lone Star's freedom to dispose of its capital assets will be impermissibly limited under *Burns*.

For the foregoing reasons, I would find that Respondent's conduct with respect to both the successorship and application of contract clauses violated Section 8(b)(3).

Dated, Washington, D.C. August 24, 1977

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX D

JD-54-76
McAlester, OK

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Cases 16–CB–924
16–CC–517
16–CC–518

UNITED MINE WORKERS OF AMERICA

and

LONE STAR STEEL COMPANY

and

SURFACE INDUSTRIES, INC.

Ronald K. Hooks, Esq.,
for the General Counsel.

Ellen P. Chapnick and Maynard I. Ungerman, Esqs.,
for United Mine Workers of America.

Lynn P. Mattson, Esq.,
for Lone Star Steel Co.

Richard L. Barnes, Esq.,
for Surface Industries, Inc.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: These matters came on for hearing at McAlester, Oklahoma, from October 21 through October 24, 1975, upon the Regional Director's complaints alleging, in general terms, that the United Mine Workers of America committed unfair labor practices by: (1) bargaining to impasse over a nonmandatory subject of bargaining (the application of contract to coal lands) and over an unlawful successorship clause in violation of Section 8(b) (3); (2) engaging in unlawful inducement and encouragement to achieve a clause unlawful under Section 8(e) (the successorship clause) in violation of Section 8(b) (4) (A); and (3) engaging in secondary boycott picketing in violation of Section 8(b) (4) (i) and (ii) (B).

Subsequent to the hearing, all counsel submitted briefs which have been duly considered and upon the record as a whole, including my observation of the witnesses, arguments and briefs of counsel, I make the following findings and conclusions:

I. Jurisdiction

Lone Star Steel Company is Texas based and manufactures steel products, principally pipe for use in the oil and gas industry. In connection with its business, it uses 36,000 to 40,000 tons of coal per month to make coke, which in turn is used in the steel making process. During the past year Lone Star purchased and received materials from outside the State of Oklahoma valued in excess of $50,000 and shipped to points outside the State of Oklahoma material valued in excess of $50,000. It is admitted, and I find, that Lone Star is an employer engaged in commerce within the meaning of Sections

2(6) and 2(7) of the Act.

II. The Labor Organization Involved

United Mine Workers of America represents employees in industries affecting interstate commerce, including the employees of Lone Star Steel Company. It is admitted, and I find, that the United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Factual Background

The parties are in general agreement concerning the factual situation. Briefly, for many years Lone Star has purchased coal from various sources, including coal mines in Oklahoma. Also Lone Star owns the mineral rights to coal fields, some of which is kept in reserve while other is mined for current needs.

Lone Star owns the rights to coal at a mine which is variously described by the witnesses as the Star Light or McCurtain (a nearby town in Southeastern Oklahoma) mine. Prior to April 1973, this coal was being mined by the River Corporation. At that time, for reasons not material nor detailed in the record, Lone Star determined to mine the coal with its own employees and began to do so.

In connection with this, Lone Star took over and became a party to the National Bituminous Coal Agreement between the United Mine Workers of America and River Corporation. Although some terms were changed by addendum, basically the agreement was followed by Lone Star and the Respondent-Union.

By its terms, the agreement would terminate on November 12, 1974. On September 7, 1974, the Respondent gave notice to all independent signatories to the agreement, of which Lone

Star was one, that it wished to terminate the agreement and negotiate a new one. During the period when the Respondent was negotiating with the Bituminous Coal Operators' Association, representatives of the Respondent also met with the vice president and general counsel of Lone Star. Apparently Lone Star sought more favorable terms than were ultimately agreed to by the Operators' Association.

In any event, along with other members of the Respondent nationwide, on November 12, 1974, employees of Lone Star engaged in an economic strike in order to force their bargaining position. Contract talks continued as did sessions between representatives of Lone Star and representatives of the Union. The Operators' Association and the Union came to an agreement; however, Lone Star did not, and its employees continued to strike.

In late December 1974, Lone Star suggested that the employees should return to work for a period of 90 days so that negotiations could continue in a less adversary context. Union representatives agreed to recommend to the National Executive Board, as well as to the local union membership, a return to work for 60 days. The National Executive Board and the local union membership concurred and on about January 6, 1975, the employees did in fact return to work

There followed negotiation sessions, but the parties remained apart on some terms. Thus no agreement was reached by March 6, and the Company asked that the employees refrain from striking for another 7 days. The Union representatives apparently agreed to this; however, this time a majority of the employees would not continue to work without a contract. On or about March 6, 1975, employees at Lone Star again went on strike which continues to date.

Paralleling these events, some time in the summer of 1974, Lone Star made a decision to commence mining its coal reserves at a mine approximately 50 miles from the Star Light mine, variously referred to as the Dow (the name of a nearby town) or Pocahontas mine. Representatives of Lone Star testified that inasmuch as they really are not in the coal mining business they determined to have this mine operated by a subcontractor who would be paid on a per-ton basis. Tentative contracts were apparently made with several individuals or companies, and finally an agreement was entered into between Lone Star and an organization called Surface, Incorporated, a corporation organized for the specific purpose of engaging in mining activity at the Dow mine. This company is a spinoff corporation of the basic Murray Brothers partnership, three brothers who engage in various type of construction work and do business through several different entities.

Inasmuch as the Murray Brothers were not familiar with strip coal mining, representatives of Lone Star were always present at the Dow mine to watch over the operation, although Surface had its own people as the supervisors and managers.

Some time in the first part of November 1974, Surface began hiring employees and mining the coal and did so until on or about March 11, 1975, when a majority of its employees ceased working.

In the latter part of January 1975, the Respondent began an organizational campaign among Surface's employees. There is testimony that some 33 authorization cards were signed among the 36 employees. A representation petition was filed in February but has not been acted on—unfair labor practice charges filed by the Union having blocked further processing.

On March 11, 1975, pickets from the employees of Lone

Star appeared at the Dow mine. On that day the Dow employees ceased working.

Prior to March 11, Surface had engaged in certain activity which led the Union to file unfair labor practice charges and which in fact are the subject of the complaint in Case No. 16-CA-6006, and which is currently pending before an administrative law judge.[1] The Union argues, therefore, that the strike by Surface employees both to protest the company's unfair labor practices and to seek recognition.

An injunction against further picketing by the United Mine Workers at the Dow mine was entered by the United States District Court for the District of Oklahoma on March 18, 1975. There has been no subsequent picketing although employees of both Lone Star and Surface continued to strike.

The employees of Lone Star are and have been members of the Respondent-Union. The employees of Surface are not members but have filed authorization cards to have the Union represent them. Presumably, they will become members if and when the Union gains recognition and finally executes a contract with Surface.

The parties stipulated that prior to March 11, 1975, the employees of Surface had a right to strike for recognition and had reasonable cause to believe that sufficient unfair labor practices had been committed by Surface so as to justify their striking in protest.

Nevertheless, Surface charges, and the General Counsel alleges, that when Lone Star employees picketed the Dow mine, the Union thereby violated Section 8(b) (4) of the Act. The

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[1] Judge Anne F. Schlezinger issued her decision in this matter on January 15, 1976, JD-4-76.

Union argues that either Surface was an ally of Lone Star and/or Surface employees had a right to strike. Thus the picketing by Lone Star employees was not an inducement to cease work, rather their own problem with Surface led them to strike.

B. Issues

The General Counsel's complaint, the Respondent's answer and this factual situation thus present the following questions:

1. Whether the Union struck over a contract clause proscribed by Section 8(e)—the successorship clause—in violation of Section 8(a) (4) (A) and 8(b) (3).

2. Whether the Union struck over a contract clause involving a nonmandatory subject of bargaining—the application of contract to coal lands—in violation of Section 8(b) (3).

3. Whether picketing at the Dow mine, on and after March 11, 1975, was violative of Section 8(b) (4) (i) and/or (ii) (B).

C. Discussion

The essence of the 8(b) (3) refusal to bargain allegation is that the Union bargained to impasse over one clause which the General Counsel claims is illegal and another which is not a mandatory subject of bargaining. For convenience, these respectively will be referred to as the successorship clause and the application of contract clause.

The successorship clause is found in Article I and reads as follows:

> In consideration of the Union's execution of this Agreement, each Employer promises that it's operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to

assume the Employer's obligations under this Agreement.

The application of contract clause is found in Article II, Section (f) of the contract and reads as follows:

Application of This Contract to the Employer's Coal Lands

> As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement or acquired during its term which may hereafter (during the term of this Agreement) be put into producion or use.

These clauses were proposed by the Union and were ultimately negotiated into the National Bituminous Coal Wage Agreement of 1974.

There is thus no question that the Union asked for and obtained a contract containing the terms in question – at least as to most employers. There is also no question that Lone Star, acting through its vice president and general counsel, rejected these clauses during negotiations.

The Union recognizes that as written, the application of contract clause could lead to an unlawful implementation. Thus amended language is to the effect that the contract could not apply to a new operation of Lone Star unless and until the Union gained representation rights among the employees either through authorization cards and/or a representation election.

Lone Star's vice president and general counsel, Howard Jensen, testified concerning the bargaining sessions and the Company's position with regard to these clauses. For instance, in a December meeting with Union representatives, Jensen stated: "I had very serious reservations about the new successor-

ship clause . . . and I had reservations about the accretion clause."

In a subsequent meeting Jensen again told the Union representative that Lone Star was not agreeing to the successorship or the application of contract clauses because they were illegal or in any event were not mandatory subjects of bargaining.

Finally Jensen stated in letters to the Union that the parties were in basic disagreement over four items, including the successorship and application of contract clauses.

Richard M. Bank, Executive Assistant to the Respondent's International President and the principal Union representative negotiating with Jensen, testified that the Union took the position throughout that the clauses were important and legal. In any event, Bank stated that Lone Star did not offer substitute language for either and that the Union was willing to consider any reasonable compromise on these issues.

Indeed, the record supports Bank's testimony that the Union did make some changes in language to conform to proposals by Lone Star – particularly including the matter of the cost-of-living escalator, and the termination clause.

A reasonable evaluation of the total record is that the Union proposed two clauses by which it sought to protect its membership, its work jurisdiction and which could be used in organizing. For what appears to be legitimate business reasons, the Company rejected the Union's proposed language.

These two items, among other things, were matters of disagreement when the strike recommenced. The strike, in part at least, was to achieve a contract containing these subjects.

It is alleged the Union bargained to "impasse" over these clauses and by striking to achieve them violated Section 8(b) (3).

The Successorship Clause

In *Operating Engineers, Local 701 (Tru-Mix Construction Co.),* 221 NLRB No. 124 (1975), decided after the hearing in this matter, the Board held that a clause of substantially the same import as the successorship clause here is not proscribed by Section 8(e). A majority of the panel concluded that in spite of a transfer of all, or substantially all, of a company's assets, the business enterprise nevertheless survives and is the same employing industry. Therefore, the transferring of assets is not "doing business" within the meaning of Section 8(e) of the Act. That is, in the event of a sale of assets or change of ownership, the company would continue to engage in its normal business with its customers and these relationships would not necessarily be affected. It is what the company does in industry which constitutes "doing business' or the lack of it within the meaning of Section 8(e).

The Board, in its *Tru-Mix* decision, distinguished *National Maritime Union, AFL-CIO (Commerce Tankers Corporation),* 196 NLRB 1100, enf'd. 486 F.2d 907 (2d Cir., 1973), cert. den. 416 U.S. 970 (1974). There it was concluded that in the maritime industry the buying and selling of ships is a common matter and is an aspect of the normal business dealings engaged in by ship companies. Therefore, the buying or selling of a vessel is "doing business" within the meaning of Section 8(e) and contractual restrictions upon these dealings are violative of Section 8(e).

Lone Star argues that it is a fully integrated steel company whose business includes buying and selling of coal properties. Thus its situation is analogous to buying and selling ships as an aspect of its "doing business."

Lone Star does buy coal and properties in order to supply its coke ovens. But its business is making steel, not selling coal

lands. In addition, should Lone Star sell the Star Light mine, the mine would continue as the employing entity, even though the ownership changed. The "doing business" in this case is mining coal and related endeavors – not selling coal properties. Under the test in *Tru-Mix,* the successorship clause is not proscribed by Section 8(e).

And it is a mandatory subject of bargaining. To insure that a successor to Lone Star would continue in force and effect all the wages, hours and other terms and conditions of employment obviously relates to those matters as to bargaining unit employees. That a successor would pay the negotiated wage rate, for instance, is surely as important to the employees as Lone Star paying the rate.

Having concluded that the successorship clause is not proscribed by Section 8(e), it follows that striking and picketing to achieve such a clause is not violative of Section 8(b) (4) (A). And to strike to achieve it is not a refusal to bargain under 8(b) (3) since it is a mandatory subject of bargaining.

The Application of Contract to Coal Lands Clause as a Subject of Bargaining

The parties sometimes refer to this clause as an accretion clause. It does not, however, by its language purport to accrete into an already existing bargaining unit new employees or a new operation.

As noted above, such impurities in the clause as may exist in the National Agreement may have been cured by the Union's most recent proposed language as to when and under what conditions the Company would be required to apply the contract to a new operation. The General Counel has not alleged this clause to be violative of the Act on its face, but only that it concerns a nonmandatory subject of bargaining.

The thrust of the General Counsel's argument is that by applying the entire contract to new operations, the Union seeks more than simply attempting to preserve bargaining unit standards. It seeks also items of institutional interest particularly including, apparently, a facility to organize new employees. In support of his position, the General Counsel cites *Oil Chemical & Atomic Workers v. N.L.R.B. (Shell Oil),* 486 F.2d 1266 (D.C. Cir., 1973) and *Local 445, International Union of Electrical, Radio & Machine Workers, AFL-CIO (Sperry Rand),* 202 NLRB 183 (1973).

The Respondent, on the other hand, argues that a contract clause which seeks to affect terms and conditions of employment of persons outside the bargaining unit is mandatory where such "vitally" affect unit employees, citing *Local 24, Teamsters v. Oliver,* 358 U.S. 283 (1958); and *Chemical Workers Local 1 v. Pittsburgh Plate Glass,* 404 U.S. 157 (1971).

In all the cases relied on by the General Counsel and Respondent, certain provisions of a contract were extended to employees outside the bargaining unit. This, however, is not that type of situation. Here no contract terms will apply to nonunit employees. Rather, should the Company create a situation in which another bargaining unit materializes *and* thereafter should the Union succeed in getting representation rights for those employees, then the contract would automatically be accepted by the employer—whether that employer be Lone Star or an affiliate to Lone Star.

Such may have some elements of protecting unit work or negotiated standards of unit employees. The clause, however, goes beyond these matters and becomes, among other things, an organizing tool.

Unit standards could be protected simply by a clause requiring Lone Star, should it open a new mine, to pay employees

no less than the wages set forth in the contract. It could do so without the contract automatically and in every respect applying to the new operation as the proposed clause does. Further, the clause could operate in areas not necessarily competitive with the work unit employees are doing, e.g., coal preparation facilities as opposed to mining; and to that extent it goes beyond protecting unit work and standards.

A fair interpretation of this clause, along with Bank's testimony, is that a principal purpose for the application of contract to coal lands is to facilitate organizing.

If it were simply to protect unit standards, then it could be written as the clause in *Oliver,* but such would not necessarily be as effective in organizing employees. Additionally, this clause can only protect the unit standards in the event that the Union is successful in organizing the employees of the new facility. If it is not successful, then the Company can apply such wages and conditions as it wishes, conceivably to the detriment of negotiated standards.

By this clause, the Union is seeking an agreement in advance that should the employer open a new and distinct facility involving coal preparation or production and not just a coal mine, and should the Union be successful in obtaining recognition rights for the employees of that new facility, then the Company will have to accept the already agreed upon contract. The question is whether this is a mandatory subject of bargaining.

Is it reasonable to say that the subject sought to be negotiated by the Union was the protection of unit standards or was it broader, including matters of institutional interest such as organizing nonunit employees? If it is simply the former, then it is mandatory. If it is of the latter, then there is some question as to whether or not it is mandatory.

It does not appear that the Board or courts have decided this precise issue; however, the matter of after-acquired property clauses has been considered, most recently in *Houston Division of the Kroger Co.*, 219 NLRB No. 43 and *Smith's Management Corp., d/b/a/ Mark-it Food,* 219 NLRB No. 45. A divided Board decided these matters accepting the D.C. Circuit's remand in *Local 445, Retail Clerks v. N.L.R.B.,* 510 F.2d 802 (D.C. Cir., 1975).

The factual situation in each is substantially the same. There was an existing multi-store bargaining unit in the retail store industry. The recognition clause to which the parties had agreed, and implemented for a number of years provided that new stores be accretions to the multi-store unit. And the contract would apply to new stores.

At issue was whether the "additional store clauses" were valid in situations where the union demonstrated majority status by authorization cards or whether, in spite of the existence of such clauses, the employer nevertheless can insist on an N.L.R.B. conducted election. It was finally concluded by a Board majority that such clauses are valid and constitute a waiver of the employer's right to demand an election, and that "national labor policy favors enforcing their validity." The Board ordered that upon request the company was to apply and extend to employees at the new stores "as part of the appropriate unit" the existing collective-bargaining agreement and give the agreement retroactive effect.

In *Young and Hay Transportation Co.*, 214 NLRB No. 39 (1974), the Board found valid an "after acquired" clause at the same time holding that neither the clause nor the Board's certification at the new facility meant that the new facility merged into the preexisting bargaining unit. Therefore, the Company did not refuse to bargain by refusing the Union's demand that

bargaining be conducted on the basis of a multi-facility unit.

An unambiguous "after acquired" clause will be given effect whether it contemplates the new facility being merged into a preexisting bargaining unit or not. Thus Board law permits a company and a union to negotiate for future employees in a future bargaining unit as the Respondent here demands.

However, whether an "after acquired" clause is a mandatory subject of bargaining is another matter – and one not an issue in any of these cases. In the *Kroger* line of cases, the clause related to the scope of the bargaining unit, and was presumably mandatory. The starting point for collective bargaining is the bargaining unit; and whether new employees will or will not be absorbed into the bargaining unit reasonably relates to employment conditions of unit employees, especially with regard to future negotiations. Given the Board's approach in these cases, and the nature of the order – that the employer accept the contract, including the "after acquired store" clause, as to the new store, it seems implicit that such a clause is in the realm of mandatory subjects. However, the clause in *Young and Hay* and the one here do not relate to the existing bargaining unit.

This application of contract clause does not purport to "accrete" into the existing bargaining unit employees of a new facility. Indeed, not knowing the nature of the operation which the employer might start up and to which this contract would then be applicable, it is not possible to tell whether a multi-facility bargaining unit would even be appropriate should such be petitioned for. Certainly, the employer could begin to process coal at another facility in such a manner that the employees doing the work would not appropriately be part of the bargaining unit here.

The application of contract to coal lands clause, as

modified by the Union, sufficiently protects the Section 7 rights of the prospective new employees. It is not alleged to be unlawful, and I conclude it is not. It is a clause which the parties could agree to and would be given effect by the Board. But I do not believe that it is a mandatory subject of bargaining.

In order to be a mandatory subject of bargaining the subject must relate to wages, hours or other terms and conditions of employment in the bargaining unit. *N.L.R.B. v. Wooster Div. of Borg Warner,* 356 U.S. 342 (1958). To set wages for nonunit employees may very well affect the wages of unit employees and therefore be mandatory. *Local 24, Teamsters v. Oliver,* 358 U.S. 283 (1958). However, to agree in advance concerning the terms and conditions of employment of nonexistent employees in a new and nonrelated facility does not particularly relate to wages, hours or the terms and conditions of employment of unit employees. I simply do not see how applying this contract to another facility of the company, should it be created and should the Union be successful in gaining recognition rights, would have any bearing on the wages, hours and other terms and conditions of unit employees.

Nor would implementation of this clause reasonably affect unit jobs, except in the situation where the Company would open another mine. This clause, by its terms goes to all phases of coal production, and not just mining. Finally, I do not believe that the principal purpose of this clause is to protect unit standards. That could be done in other ways, for instance, by providing that the employer would not engage in a competitive operation and pay employees less or grant them less favorable working conditions.

I conclude that the principal purpose for the application of contract clause is as an organizing device. As such, while not illegal and certainly from the Union standpoint desirable, never-

theless it does not relate to wages, hours and other terms and conditions of employment of unit employees. This clause cannot be considered a mandatory subject of bargaining. To negotiate a contract covering nonexistent employees in a nonexistent bargaining unit may be permissible, but it is not required.

The record is clear that the Union is engaging in a strike to achieve its bargaining proposals, including the application of contract to coal lands clause and to that extent it is striking over a nonmandatory subject of bargaining.

It is argued that the Union bargained to impasse over the application clause and therefore violated Section 8(b) (3). Impasse is a plastic concept and not really material here. Whether the parties reached an impasse, and if so when, need not be decided. The Union can strike to force its bargaining position, whether or not there has been an impasse. It cannot, however, strike to force the Company to accept a nonmandatory subject of bargaining even if there was no impasse. To the extent it is striking to achieve agreement on a nonmandatory subject, it is refusing to bargain within the meaning of Section 8(b) (3), e.g., *Local 445, Int'l Union of Electrical Radio & Machine Workers, AFL-CIO (Sperry Systems Management Div., Sperry Rand Copr.) 202 NLRB 183 (1973).*

Striking and Picketing at the Star Light Mine

On November 12, 1974, employees of Lone Star, along with other members of United Mine Workers, commenced an economic strike in furtherance of their contract demands. The strike was settled nationally when the contract was executed. Thereafter, Lone Star employees continued to strike until it was determined by agreement of the parties that they would return to work for 60 days in an effort to work out a settlement to the

contract. This they did on January 6, 1975. They continued to work until March 6, 1975, at which time they again struck.

In connection with the strike, Lone Star employees have picketed the Star Light mine.

This strike is alleged by the General Counsel to be violative of the Act only insofar as it is in furtherance of the Union's demand concerning a permissive subject of bargaining and/or for an unlawful contract clause. The General Counsel does not allege that the strike and picketing activity as to the Lone Star facility is in any other respect violative of the Act.

Inasmuch as I have concluded that the successorship clause is not violative of Section 8(e), the strike and picketing of Lone Star would not be violative of the Section 8(b) (4) (A).

The strike does, however, violate Section 8(b) (3) to the extent that one factor concerns the Union's demand for a non-mandatory subject of bargaining.

The Strike and Picketing Activity by Lone Star Employees at the Dow Mine

A few days after they recommenced striking, the Lone Star employees put up picket signs and walked with picket signs in the vicinity of the gate to the Dow mine. Thereafter, and reasonably as a result of this picketing, Surface employees of the Dow mine ceased working and continue to strike to the present time.

The Respondent argues that Surface employees had a right to strike, namely to protest unfair labor practices and/or for recognition. However, it is more probable that these employees left work when they did, on March 11, 1975 because of the picketing by Lone Star employees.

Conversely, had the Surface employees been motivated

only by their desire to protest unfair labor practices or to seek recognition, it follows they would have begun striking prior to March 11, if not on February 25 or shortly thereafter. The point is, if the Surface employees had reason to believe they could and should engage in an unfair labor practice strike and/or to seek recognition, they reasonably would have begun striking earlier. Having not, the conclusion is inescapable that they would not have gone out on March 11 but for the picketing.

The Surface employees may very well have had legitimate reasons to engage in a work stoppage, and they may very well at this time be entitled to such benefits as accrue to unfair labor practice strikers. Nevertheless, it must be found that a precipitating cause of their ceasing work on March 11, 1975, was the picket activity engaged in by Lone Star employees. The question is whether the picketing was secondary and violated the Act.

Although Lone Star had employees, really representatives of management, at the Dow facilities at all times to superintend the excavation of the coal, and although Lone Star owned the right to the coal being excavated, nevertheless, it is concluded that the Dow mine was not sufficiently a primary situs of Lone Star's work so as to render the picketing primary from that standpoint.

However, it is concluded that Surface is sufficiently allied with Lone Star so as not to be considered a neutral with regard to Lone Star's labor dispute with its employees.

From the totality of the evidence it is concluded that the principal reason Lone Star determined to have the coal at the Dow mine excavated by employees of a subcontractor, rather than hiring its own, was the prospect of a 1974 strike. The timing is significant. While Lone Star keeps much of its coal in

reserve, it was only in the late summer of 1974 that it determined to start mining the Dow mine. Further, it reasonably appears from the testimony and the evidence that a reason Lone Star started to mine the Dow coal was to have an alternative source of supply should the Star Light facility be shut down.

There was much testimony that the Dow coal is not identical to, and would not be a substitute for, the Star Light coal. Nevertheless, from all of the chemical properties it does appear that the Dow coal when mixed with coal from other sources could reasonably be a replacement for the Star Light coal and indeed has been. Thus, without Star Light coal but with Dow coal mixed with other coal, Lone Star was able to make coke.

I credit the testimony of Johnnie Enlow to the effect that Lone Star sought an independent subcontractor to mine the coal so that it would have an alternative source of supply in case of a strike. And I discredit testimony indicating otherwise – specifically the testimony of J. Paul Sanvage. It is more probable that the possible strike was the reason Lone Star chose to operate through a subcontractor than the reasons given by Lone Star witnesses. Specifically, it is noted that now and since 1973, Lone Star has operated the Star Light mine which is located only 50 some miles from the Dow mine. For Lone Star management to say that they are not primarily in the business of mining coal is just simply not the case. Lone Star is experienced in coal mining, yet, it contracted the Dow work to an experienced [sic] operator. This has to have been less efficient, if for no other reason than Lone Star management had to keep in fairly close supervision.

I conclude that the arrangement originated by Lone Star to have its reserves mined by an independent contractor created an ally situation, even though Dow coal has somewhat different properties than the Star Light coal. Dow is Lone Star's mine.

And the coal goes into Lone Star's coke ovens. From the totality of the evidence, including the fact that Lone Star owned the coal, used the coal, had management superintending the excavation by an inexperienced operator, set up the operation in late October of 1974, just weeks before the national strike, it is concluded that Surface is not a neutral employer in the sense of 8(b) (4). Rather, Surface is an ally and for Lone Star employees to picket the premises where Surface was operating was not for an object proscribed in Subsection (B) of 8(b) (4). Hence the picketing was not violative of Section 8(b) (4) (i) or (ii) (B). *Graphic Arts International Union (G.A.I.U.), Local #277; and Graphic Arts Int'l Union, AFL-CIO (S & M Retrogavure Service, Inc.),* 219 NLRB No. 171 (1975).

Finding Surface to be a legal "ally" does not imply that the Murray Brothers were privy to Lone Star's planning or even knew what they were getting into. I believe from their testimony that the Murrays, who are in the construction business in various ways, were not aware of the potential hazards involved. Nevertheless, for purposes of 8(b) (4), Surface is an "ally." I note also that Lone Star is paying expenses, including legal fees, incurred by Surface with regard to these matters further indicating that as to this labor dispute and the work involved, the parties consider themselves allied.

Two further matters should be mentioned. First, on the day that the Star Light employees began picketing the Dow mine, Surface attempted to set up a separate gate for Lone Star employees. The testimony, however, is to the effect that while this may have been the aim, no separate gate ever effectively functioned. Indeed, the bulldozer operator who was sent out to set up the separate gate testified that the road which Surface sought to have used by Lone Star employees was impassable inasmuch as there a ditch across [sic.]. The road could not have

been used without filling in the ditch.

The other matter concerns Dow employees' right to strike without regard to Lone Star picketing. No doubt Dow employees did and do have the right to strike for recognition and to protest alleged unfair labor practices. This right, however, has no materiality to the question of whether or not picketing by Lone Star employees is proscribed by the Act. The activity engaged in by Lone Star employees must stand on its own, which, it is concluded, was lawful picketing of an allied employer. No determination here is made with regard to the alleged unfair labor practices engaged in by Surface as to its employees or the representation matter. See Footnote 1.

IV. The Effect of the Unfair Labor Practices

The conduct of the Respondent, outlined above, occurring in connection with the operations of Lone Star as set forth in section I, has a close, intimate, and substantial relation to trade, traffic and commerce among the several states and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has violated the Act by forcing, through strike activity, the Company to accept its demand for a nonmandatory subject of bargaining, I shall recommend that the Respondent be required to cease and desist from continuing such activity.

However, inasmuch as the parties agree that other subjects remained to be resolved, I shall not recommend that the strike itself be found to be an unfair labor practice. Rather, it appears that the policies of the Act can be fully effectuated by requiring the Union to withdraw its demand for the application of con-

tract to coal lands clause and to bargain with the Company upon request concerning other matters.

I shall also recommend that the Respondent be required to send a copy of the attached notice to its striking members as well as copies to the Company for posting upon such bulletin boards as the Company may deem appropriate.

The Respondent's defense in this matter is certainly not frivolous – it having prevailed on most points – so as to warrant an award against it of costs of litigation incurred by the Company. Lone Star's request for attorney's fees is therefore denied. Cf. *Tiidee Products, Inc.,* 194 NLRB 1234 (1972).

Conclusions of Law

1. The Lone Star Steel Company is an employer engaged in interstate commerce within the meaning of Sections 2(6) and 2(7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. The allegation in the complaint that the Respondent violated Section 8(b) (3) of the Act by insisting on the Company's acceptance of a nonmandatory subject of bargaining (the application of contract to coal lands) has been sustained.

4. The allegation in the complaint that the successorship clause is violative of Section 8(e) of the Act has not been sustained.

5. The allegation in the complaint that the Respondent engaged in unfair labor practices within the meaning of Section 8(b) (4) (i) and (ii) (A) of the Act has not been sustained.

6. The allegations in the complaint that the Respondent engaged in picketing activity in violation of Section 8(b) (4) (i)

and (ii) (B) of the Act has not been sustained.

Upon the foregoing findings of fact and conclusions of law and the entire record in this case and pursuant to Section 10(c) of the Act, I hereby issue the following recommended Order:[2]

Recommended Order

Respondent, United Mine Workers of America, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Demanding that Lone Star Steel Company, or any other employer, accept as an element of any collective-bargaining agreement the clause referred to as the Application of This Contract to the Employer's Coal Lands set forth in the National Bituminous Coal Wage Agreement of 1974.

(b) Striking and/or picketing Lone Star Steel Company, or any other employer, for the purpose of forcing Lone Star Steel Company, or any other employer to agree to the application of contract to coal lands clause.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Withdraw, and notify Lone Star Steel Company that it has withdrawn, its demand for the application of contract to coal lands clause.

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[2]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and the recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Send a copy of the attached notice marked "Appendix"[3] to each striking employee and to Lone Star Steel Company. Copies of the notice on forms provided by the Regional Director for Region 16, after being duly signed by the Respondent's representative shall be posted.

(c) Notify the Regional Director for Region 16, in writing, within 20 days after the receipt of this Order what steps Respondent has taken to comply herewith.

3. The complaint is dismissed to the extent that it alleges Respondent engaged in any other unlawful activity than that set forth in this Order.

Dated, Washington, D.C.

S/S James L. Rose
James L. Rose
Administrative Law Judge

[3] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

FORM NLRB – 4726 (4-71) APPENDIX JD-54-76

NOTICE TO MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT demand that Lone Star Steel Company, or any other company, accept our proposed contract clause set forth in the National Bituminous Coal Wage Agreement of 1974 styled the Application of This Contract to the Employer's Coal Lands.

We hereby withdraw our demand for such a clause in connection with our negotiations for a contract with Lone Star Steel Company.

WE WILL NOT strike, picket or otherwise try to force Lone Star Steel Company, or any other employer, into accepting the application of contract to coal lands clause or any other non-mandatory subject of collective bargaining.

UNITED MINE WORKERS OF AMERICA, AFL-CIO

Dated_____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office. Skyline East Building, South Tower, First Floor, 6128 E. 38th Floor Tulsa, Oklahoma 74103 (Telephone No. 918 - 581-7952)

APPENDIX E

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1974

Article I – ENABLING CLAUSE

THIS AGREEMENT made this ..... day of..... ..... 19....., between the operators and associations signatory hereto, as parties of the first part (each coal operator which is a signatory hereto being called "Employer") and the International Union, United Mine Workers of America (hereinafter called "Union"), on behalf of each member thereof, as party of the second part, covers all of the bituminous coal mines owned or operated by said first parties. This Agreement carries forward and preserves the terms and conditions of all the various District agreements executed between the United Mine Workers of America and the various operators and coal associations subject to the terms and conditions of this Agreement and as amended, modified and supplemented by this Agreement as herein set out.

This Agreement shall be binding upon all signatories hereto, including those Employers which are members of signatory associations, and their successors and assigns. In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement. Provided that the Employer shall not be a guarantor or be held liable for any breach by the successor or assignee of its obligations, and the UMWA will look exclusively to the successor or assignee for compliance with the terms of this Agreement.

WITNESSETH: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties, as defined and set forth in this Agreement. It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the Employees of the parties of the first part. It is further agreed that as a condition of employment all Employees shall be, or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law, except in those exempted classifications of employment as hereinafter provided in this Agreement. This provision does not change the rules or practices of the industry pertaining to management. The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood. It is the intent and purpose of the parties hereto that this Agreement will promote and improve industrial and economic relationships in the bituminous coal industry and to set forth herein the basic agreements covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed in the bituminous coal mines covered by this Agreement. Management will not abridge the rights of the Employees as set forth in this Agreement.

Article II—SCOPE AND COVERAGE

Section (a) **Work Jurisdiction**

The production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal (except by waterway or rail not owned by Employer), repair and maintenance work normally performed at the mine site or at a central shop of the Employer and maintenance of gob piles and mine roads, and work customarily related to all of the above shall be performed by

classified Employees of the Employer covered by and in accordance with the terms of this Agreement. Contracting, subcontracting, leasing and subleasing, and construction work, as defined herein, will be conducted in accordance with the provisions of this Article.

Nothing is this section will be construed to diminish the jurisdiction, express or implied, of the United Mine Workers.

Section (b) **Exemptions Clause**

It is the intention of this Agreement to reserve to the Employers and except from this Agreement an adequate force of supervisory Employees to effectively conduct the safe and efficient operation of the mines and at the same time, to provide against the abuse of such exemptions by excepting more such Employees than are reasonably required for that purpose.

Coal inspectors and weigh bosses at mines where men are paid by the ton, watchmen, clerks, engineering and technical forces of the Employer, working at or from a district or local mine office, are exempt from this Agreement.

All other Employees working in or about the mine shall be included in this Agreement except essential supervisors in fact such as mine foremen, assistant mine foremen who, in the usual performance of their duties, may make examinations for gas as prescribed by law, and such other supervisors as are in charge of any class of labor inside or outside of the mines and who perform no production work.

The Union will not seek to organize or ask recognition for such excepted supervisory Employees during the life of this contract.

The Employers shall not use this provision to exempt from the provisions of this Agreement as supervisors, more men than

are necessary for the safe and efficient operation of the mine, taking into consideration the area covered by the workings, roof conditions, drainage conditions, explosion hazards, and the ability of supervisors, due to thickness of the seam, to make the essential number of visits to the working faces as required by law and safety regulations.

Section (c) **Supervisors Shall Not Perform Classified Work**

Supervisory Employees shall perform no classified work covered by this Agreement except in emergencies and except if such work is necessary for the purpose of training or instructing classified Employees. When a dispute arises under this section, it shall be adjudicated through the grievance machinery and in such proceedings the following rule will apply: the burden in on the Employer to prove that classified work has not been performed by supervisory personnel.

Section (d) **Management of the Mines**

The management of the mine, the direction of the working force and the right to hire and discharge are vested exclusively in the Employer.

Section (e) **Union's Rights**

Authorized representatives of the Union shall be permitted reasonable access to the mine property to insure compliance with this Agreement. The Employer shall provide candidates for Union office reasonable opportunity to campaign among his Employees during their nonworking hours and in nonworking areas, provided there is no interference with production. The Employer further agrees to provide to the extent practicable, space on mine property for the holding of Union elections and the ratification of collective bargaining agreements.

Section (f) **Application of This Contract to the Employer's Coal Lands**

As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use.

Section (g) **Contracting and Subcontracting**

(1) Transportation of Coal – The transportation of coal as defined in paragraph (a) may be contracted out only to a contractor employing members of the UMWA under this Agreement and only where contracting out such work is consistent with the prior practice and custom of the Employer.

(2) Repair and Maintenance Work – Repair and maintenance work customarily performed by classified Employees at the mine or central shop shall not be contracted out except (a) where the work is being performed by a manufacturer or supplier under warranty, or (b) where the Employer does not have available equipment or regular Employees with necessary skills available to perform the work at the mine or central shop, provided, however, that the work shall be performed by UMWA members to the extent and in the manner permitted by law.

(3) The Employer may not contract out the rough grading in mine reclamation work.

Section (h) **Leasing, Subleasing and Licensing Out of Coal Lands**

The Employers agree that they will not lease, sublease or license out any coal lands, coal producing or coal preparation

facilities where the purpose thereof is to avoid the application of this Agreement or any section, paragraph or clause thereof.

Licensing out of coal mining operations on coal lands owned or held under lease or sublease by any signatory operator hereto shall not be permitted unless the work involved is performed by members of the United Mine Workers of America in the manner and to the extent permitted by law and that the licensing out does not cause or result in the layoff of Employees of the Employer: provided, however, that either the licensor or licensee or sublessee makes the appropriate payments provided by this Agreement to the United Mine Workers of America Health and Retirement Fund and otherwise abide by the terms of the Agreement.

Section (i) **Construction Work**

All construction of mine or mine related facilities including the erection of mine tipples and sinking of mine shafts or slopes which is not performed by the Employer, may be performed by such outside contractors as are designated by the Employer, and such work will be under the jurisdiction of the United Mine Workers of America in the manner and to the extent permitted by law.

Article XXVII – MAINTAIN INTEGRITY OF CONTRACT AND RESORT TO COURTS

The United Mine Workers of America and the Employers agree and affirm that, except as provided herein, they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Disputes" Article of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as

heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract and by collective bargaining without recourse to the courts.

The Employer, however, expressly authorizes the Union to seek judicial relief, without exhausting the grievance machinery, in cases involving successorship.